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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1988

QUALITY INN SOUTH, MANIBHAI PATEL, DILIP PATEL, SUMANI CORP., INC., *Petitioners,*

v.

RAJNI J. PATEL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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November 14, 1988

QUESTIONS PRESENTED

1. Given the comprehensive scheme for criminalizing the hiring of illegal aliens enacted in the Immigration Reform and Control Act of 1986, can illegal alien workers invoke the same government power to demand employment-related statutory benefits as citizen or legal alien employees?

2. If illegal alien workers may still demand employment-related statutory benefits despite not being authorized to work, should illegal aliens be allowed to obtain back pay and liquidated damages under the Fair Labor Standards Act, *as amended*, 29 U.S.C. §§ 203, 206, 207, 216 (1982) (implicitly extending the holding in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984))?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Petitioner certifies that the complete list of all parties to the proceedings below and all parties and persons believed to be interested in the outcome of this Petition includes:

Rajni Patel

Quality Inn South

Sumani Corporation, Inc.

Manibhai Patel

Dilip Patel

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Counsel for Petitioner

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No. _____

IN THE

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NOVEMBER TERM, 1988

QUALITY INN SOUTH, Manibhai Patel, Dilip Patel, Sumani Corp., Inc., Petitioners

v.

RAJNI J. PATEL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner Quality Inn South respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on August 15, 1988

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 846 F.2d 700 (11th Cir. 1988), and is reprinted in Appendix B hereto.

The memorandum decision of the United States District Court for the Northern District of Alabama (Acker, J.) is reported at 660 F. Supp. 1528 (N.D. Ala. 1987), and is reprinted in Appendix A hereto.

STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the respondent brought this suit in the Northern District of Alabama. On May 27, 1987, the Northern District granted petitioners' motion for summary judgment. Appendix A, p. 17.

Respondent appealed to the Eleventh Circuit on June 8, 1988, and the court entered a judgment and an opinion reversing the Northern District's orders and remanding the case for a determination of the merits. Appendix B, p. 13.

The Eleventh Circuit subsequently denied petitioners' motion to reconsider on August 17, 1988.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The following United States Statute is involved in this case:

Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (in relevant part):

§ 203. Definitions

As used in this chapter--

(e)(1) Except as provided in paragraphs (2), (3), and (4) the term "employee" means any individual employed by an employer.

§ 216. Penalties

(a) Fines and imprisonment

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be ap-

propriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought, as a result of alleged violations of section 215(a)(3) of this title.

STATEMENT OF CONTEXT

I. ILLEGAL IMMIGRATION -- AN ENORMOUS NATIONAL PROBLEM

By the early 1980s, most observers believed that illegal immigration reached record levels. 131 CONG. REC. S11,258 (Sept. 11, 1985) (statement of Sen. Simpson). Government officials, such as William French Smith, then Attorney General of the United States, considered the enormous level of illegal immigration a crisis:

> We must reform our immigration laws. Legislative proposals introduced in the 98th Congress . . . are clearly our nation's best hope for averting an immigration problem which is already assuming overwhelming dimensions. The circumstances we face, which are characterized in general by widespread abuses of immigration law, have been aptly described by Theodore H. White:
>
> > One starts with the obvious: that the United States has lost one of the cardinal attributes of sovereignty--it no longer controls its own borders. Its immigration laws are flouted by aliens and citizens alike, as no system of laws has been flouted since Prohibition.

W. Smith, *Immigration Law Reform: Proposals in the 98th Congress*, 21 SAN DIEGO L. REV. 7, 7-8 (1983) (*quoting* T. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980, 361 (1982)).

President Carter appointed a Select Commission on Immigration and Refugee Policy (SCIRP) to devise a resolution of the problem. The SCIRP, led by the Reverend Theodore M. Hesburgh, solicited comments and assistance from 698 persons. STAFF REPORT OF THE SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND

THE NATIONAL INTEREST, April 30, 1981, at xvi. The SCIRP concluded that prohibiting the employment of illegal aliens was the only effective means of resolving America's illegal immigration problem.

The SCIRP also recommended granting legalization of status (amnesty) to illegal immigrants with long and close ties to the United States, but the central proposal of the SCIRP was for additional immigration laws. Chairman Hesburgh concluded that the legalization program would work only if enforcement measures were enacted. *Id.* at 14.

Following the Commission's report, Congress made several attempts to pass legislation which would penalize employers. *E.g.*, S. 776, 97th Cong., 1st Sess., 127 CONG. REC. 5054, 5054 (1981); S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. 4571, 4574 (1982). In 1984, both the Senate and the House of Representatives passed differing versions of the "Simpson/Mazzoli" bill, but the bills died in conference. H.R. 1510, 98th Cong. 2d Sess., 130 CONG. REC. 6150 (daily ed. June 20, 1984) (agreeing to conference the bill); SENATE COMM. ON THE JUDICIARY, IMMIGRATION REFORM AND CONTROL, S. REP. NO. 62, 98th Cong., 1st Sess. (1983) (reporting on S. 529).

In 1986, Congress finally enacted a comprehensive reform package to eliminate illegal immigration to the United States. The Immigration Reform and Control Act of 1986, Pub. L. 99-603; 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) [hereinafter IRCA]. In the IRCA, Congress made it illegal to hire illegal aliens, rectifying an anomaly that had long mystified this Court. *See also DeCanas v. Bica*, 424 U.S. 351, 359 & n.7 (1976) (describing the central concern of INA as the terms of admission to the country; also noting that "nothing

remotely resembling the NLRA scheme is to be found in the INA").

II. CONGRESS ENACTED IRCA AS A COMPREHENSIVE SCHEME TO STOP ILLEGAL IMMIGRATION

Senator Simpson, the chief sponsor of IRCA noted:

> [T]he major purpose of the bill is to increase control over illegal immigration. The primary incentive for illegal immigration is the availability of U.S employment. In order to reduce that incentive, the bill makes unlawful the knowing employment, or the recruitment, or referral for a fee, of illegal aliens; provides for an optional system to verify work eligibility; and establishes appropriate penalties for violation. These penalties will be substantial enough not to be just a cost of doing business.

131 CONG. REC. S11,258 (daily ed. Sept. 11, 1985) (statement of Sen. Simpson).

The prohibition on hiring an illegal immigrant enacted in the IRCA is complex and extensive. IRCA makes it unlawful to hire, recruit, or refer for employment an "unauthorized" alien, or for any person to be hired without verifying the person's eligibility to work. 8 U.S.C. § 1324a(a)(1) (Supp. 1986). Nor may an employer continue to employ an unauthorized alien. 8 U.S.C. § 1324a(a)(2). An elaborate scheme is created to allow prospective employers to verify job applicants' eligibility for work. 8 U.S.C. § 1324a(b). The Attorney General and his designees investigate and adjudicate violations, and may levy both civil and criminal penalties. 8 U.S.C. § 1324a(e), (f). Because of the extensive and intrusive nature of the new law, Congress established education and warning periods, during which enforcement of the new law was withheld. 8 U.S.C. § 1324a(i). The operations of the new law were to be scrutinized by several reviewing entities, 8 U.S.C. §

1324a(j), (k), and the program could be terminated if it caused discrimination or undue burden on businesses. 8 U.S.C. § 1324a(l), (n).

In addition, IRCA established a new anti-discrimination mechanism to insure that American workers were not discriminated against in employment (although citizens could be preferred). 8 U.S.C. § 1324b, 1324b(a)(4). IRCA also criminalized the use of false documentation to avoid the prohibition on hiring illegal immigrants. 18 U.S.C. § 1546(2).

The IRCA represents the culmination of many years' work to control illegal immigration. IRCA was a delicately balanced compromise among numerous interests. The mechanism to criminalize the hiring of illegal immigrants blended the desires of employers' representatives with those of American workers' representatives. Congress contemplated no penalties beyond the civil and criminal sanctions enacted in the IRCA for employers who hired illegal immigrants.

IRCA has proven effective during its short existence. 940,670 illegal immigrants were apprehended in Fiscal Year 1988, compared to 1,222,067 in Fiscal Year 1987 and 1,615,854 in Fiscal Year 1986. Because the implementation of penalties was delayed by the IRCA, 8 U.S.C. § 1324a(i), the first criminal fine was reported only November 2, 1988. *Md. Firm Fined $60,000 for Hiring Illegal Workers*, Washington Post, at 4, col. 1 (Nov. 3, 1988) (reporting that Wendy's restaurants were first to receive criminal fine under IRCA).

STATEMENT OF THE CASE

Respondent Rajni Patel is a lawyer from India. On June 1, 1982, Respondent arrived in the United States with a six-week visitor's visa; he admits that he remained illegally in the United States after his visa expired. On or about July 11, 1983, he came to Birmingham, Alabama, and stayed at the Quality Inn South. Petitioner Sumani Corporation at that time leased and managed the Quality Inn South.

Although Respondent claims he came to Birmingham to work for Petitioners, Petitioners Manibhai and Dilip Patel (who are not related to Rajni Patel) say that Respondent was never employed by them, by the Quality Inn South, or by Sumani Corporation. Petitioners simply allowed Respondent to stay at the motel as a favor to Respondent's cousin, who operates another motel in New Orleans.

Petitioners did pay Respondent for some work he performed for them as an independent contractor. Respondent left the Quality Inn South on or about October 27, 1985 and returned to New Orleans. On August 19, 1986, Respondent filed this action in the United States District Court for the Northern District of Alabama, seeking recovery under the Fair Labor Standards Act of 1938. 29 U.S.C. § 216 (1982).

Petitioners claimed that Respondent was not an "employee" within the definition of the Act, and even if he were, he was ineligible to recover under the Act because he was an illegal alien. The District Court granted Defendant's motion for summary judgment, finding "Patel has offered nothing whatsoever in response to defendants' motion for summary judgment as he is required to do under *Celotex Corp. v. Catrett*, ___ U.S. ___,

106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." App. A, p. 16-17. The District Court also held that illegal aliens have no right of action under the FLSA:

> Patel now asks this court to help him perform a fraud upon the American labor force by frustrating the plain purpose of the INA to discourage the illegal entry into this country of aliens seeking work. Such assistance by this court, if it should award the same protections under the FLSA to illegal aliens that are guaranteed workers legally within this country, would effectively repudiate the policy and purpose behind the recent amendments to the INA.

Id.

Respondent appealed to the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals held that "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." App. B, p. 8. The Eleventh Circuit then reversed the summary judgment ruling and remanded the case for trial. A Suggestion for Rehearing was denied.

Petitioners come before this Court seeking a petition for certiorari and review of the Eleventh Circuit's ruling.

REASONS FOR GRANTING THE WRIT

The ultimate issue in this case is whether, after enactment of the IRCA, illegal immigrant workers have the same employment-related rights as citizen and legal resident alien workers? If there is a difference between illegal and legal workers' rights, can illegal workers obtain government-aided enforcement of employment-related benefits? And how should a court view this question--as one to be examined under an immigration law analysis, a traditional labor law analysis, or some combination of the two analyses?

As increasing numbers of illegal immigrants demand employment-related benefits, courts have been forced to reconcile a seeming conflict between the immigration laws and labor laws. The immigration laws clearly contemplate stopping illegal immigration, but, until the IRCA, did not criminalize the actual hiring of illegal alien workers. On the other hand, labor laws clearly contemplate protecting workers against abuse and exploitation, but labor laws were not written with illegal aliens in mind.

Before the IRCA, courts reconciled this conflict by finding that the immigration laws were only peripherally concerned with answering questions about the employment of illegal immigrants. Thus faced with compelling labor laws and seemingly indifferent immigration statutes, courts invariably found in favor of granting benefits to illegal immigrants. Even statutes that themselves specifically prohibited coverage by illegal immigrants were used by illegal aliens claiming to be eligible "under color of law."

Even in this pre-IRCA era, however, this Court counseled caution, requiring a careful examination of

the purposes of the immigration laws before moving to traditional labor law analyses. Even after finding eligibility for benefits by illegal aliens, this Court carefully limited remedies to disrupt least the immigration laws and to discourage illegal immigration to the greatest degree possible.

Most lower courts, however, ignored this Court's direction. Lower courts expanded or ignored this Court's decisions, sometimes with bizarre results (such as deciding that a prohibition on employing illegal immigrants meant that illegal aliens were entitled to programs to help the "involuntarily unemployed").

The passage of IRCA, however, shifts the balance of legal analysis in these cases. The comprehensive scheme criminalizing the hiring of illegal immigrants means that employment of illegal immigrants is now central--not peripheral--to the immigration laws. Thus, under this Court's teachings, the first inquiry upon the demand of an illegal immigrant for an employment-related benefit should be: what will be the effect of granting the demand on stopping employment of illegal aliens and, ultimately, illegal immigration?

Again, the lower courts have misunderstood or ignored this message. As in this case, where the Court of Appeals speculated on the effect of IRCA on earlier decisions, lower courts need guidance as to the effect of IRCA.

This Court should review the decision of the lower court and instruct lower courts generally about the proper analysis of the effect of the IRCA on illegal immigrants' demands for employment-related benefits. Now that Congress has answered this Court's concerns about the purposes of the immigration laws, this Court should adopt Justice Powell's reasoning in *Sure-Tan*.

I. COURTS NEED GUIDANCE AS TO THE RIGHTS OF ILLEGAL ALIENS TO OBTAIN GOVERNMENT ENFORCEMENT OF EMPLOYMENT-RELATED BENEFITS.

A. Illegal Immigrant Workers Are Increasingly Demanding the Same Rights As American Workers.

The demands of illegal alien workers used to be relatively rare: illegal immigrants rarely invoked government assistance in obtaining redress for grievances against employers; they were often underpaid and exploited. This Court found that this vulnerability to exploitation harmed American workers as well as the aliens themselves: "[A]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions." *DeCanas v. Bica*, 424 U.S. 351, 356-7 (1976).

Increasingly, however, illegal aliens are demanding the same rights as American workers to have the government enforce employment-related protections against physical dangers or economic injustice. Illegal immigrants have sought and obtained unemployment compensation. *See* Stein & Zanowic, *Permanent Resident Alien Under Color of Law: The Opening Door to Alien Entitlement Eligibility*, I GEO. IMMIGR. L.J. 231, 252-63 (1986) [hereinafter *PRUCOL*]. Wage losses to illegal alien workers from on-the-job injuries have been held compensable. *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779, 784-5 (E.D. Pa. 1975). Recently, the Seventh

Circuit said that Congress' declaring illegal the employment of illegal immigrants in the IRCA makes the families of illegal immigrants eligible for assistance designed for the "involuntarily unemployed." *Doe v. Reivitz*, 830 F.2d 1441, 1449 (7th Cir. 1987) (*quoting Batterton v. Francis*, 432 U.S. 416, 429 (1977)).

These demands by illegal aliens are not confined to employment-related cases. *See PRUCOL, supra* p. 12 (discussing illegal alien entitlements). As illegal aliens increasingly demand social services and other rights heretofore reserved to citizens and legal resident aliens, resources are stretched, citizen support for continued social services is eroded, and eligible needy Americans may be refused services which otherwise should be available to them. Nevertheless, this case looks only at employment-related rights afforded to American workers.

Illegal immigrants have similarly sought benefits under the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1982), *Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 894 (1984); the Service Contract Act of 1965, 41 U.S.C. §§ 351-58 (1982), *American Waste Removal Co. v. Donovan*, 748 F.2d 1406 (10th Cir. 1984); and the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1982 & Supp. 1986), *Hernandez v. M/V Rajaan*, 841 F.2d 582, *modified*, 848 F.2d 498 (5th Cir.), *petition for cert. filed sub nom. Dianella Shipping Corp. v. Hernandez*, 57 U.S.L.W. 3314 (U.S. Oct. 15, 1988) (No. 88-641).

Illegal immigrants have even obtained protection under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-72 (1982 & Supp. 1986) [hereinafter MSAWPA], even though that act makes it unlawful to hire illegal aliens. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), *cert. denied sub nom. Grif-*

fin and Brand of McAllen, Inc. v. Reyes, 108 S. Ct. 2901 (1988).

Here, an illegal immigrant has demanded back pay and liquidated damages under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203, 206. Aliens have requested coverage by FLSA before. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (holding illegal status irrelevant); and *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705, 718, n.12 (9th Cir. 1986) (noting that illegal aliens are entitled to back pay for violations of the FLSA).

How should courts examine these claims? Should courts look to the traditional purposes of employment-related worker protection statutes, even though the authors of those statutes never contemplated illegal alien workers? Should courts look to the immigration laws, which make the presence and employment of an illegal alien a crime? Or should courts utilize an analysis which blends the two kinds of laws, balancing the interests intended to be protected by both?

B. By Not Considering Interests Protected By Immigration Laws, Courts Are Blurring The Distinction Between Legal And Illegal Aliens.

Most courts which have considered these claims have relied primarily on traditional labor law analyses, and provided answers based on employment-related statutes which do not mention illegal aliens. Such an analysis usually obscures or ignores the interests sought to be protected by the immigration laws.

1. The traditional labor law analysis always finds for the illegal alien worker.

Faced with employment-related legal questions, courts have increasingly granted the same employment-related rights to illegal immigrant workers as they traditionally give to American workers. In virtually every case, reviewing courts have examined the questions as merely labor law-related, with some peripheral glances at immigration law. In *In re Reyes*, for example, the Fifth Circuit held that, because legal status is "irrelevant" to FLSA coverage, even inquiring as to legal status was improper. 814 F.2d at 170. Judge Jones vigorously dissented, finding that the MSAWPA's prohibition on hiring illegal immigrants would be undercut by granting coverage to illegal aliens. 814 F.2d at 171-72 (Jones, J., dissenting). Judge Jones' analysis of a statute prohibiting employment of illegal aliens applies squarely in this case and was cited by Judge Acker in the District Court in this case. but was ignored by the court below.

In unemployment cases, similarly, federal and state courts have ignored unemployment compensation statutes which prohibit participation by illegal immigrants and have granted illegal workers' demands for compensation. *See PRUCOL*, *supra* p. 12 at 252-63. The theory often used is that the alien has worked for the requisite period of time, the Immigration Service has not deported the alien, thus the alien is residing in the United States "under color of law," and is entitled to the same relief as a legal worker.

2. This Court has balanced the interests protected by immigration-related and labor laws.

This Court, on the other hand, has applied traditional labor law analyses only gingerly and as a last resort.

This Court's decisions, especially after the IRCA, demonstrate that a search for immigration law-related interests is mandatory for any review of claims by illegal immigrants. Facing claims by illegal aliens in National Labor Relations Act cases, for example, this Court held that, in the absence of an expressed interest in the employment of illegal aliens by the Immigration and Nationality Act, the NLRA's protections apply to unfair labor practices directed with stated animus against illegal alien workers. *Sure-Tan*, 467 U.S. at 894-96.

The Court carefully held that the NLRA sanctioned anti-labor animus, even where directed against illegal aliens. "Absent this specific finding of antiunion animus, it would not be an unfair labor practice to report or discharge an undocumented alien employee." *Id.* at 896.

This limited holding in *Sure-Tan* recognizes both then-existing immigration law and labor law. "Such a holding is consistent with the policies of both the INA and the NLRA." *Id.* For many years, this Court has noted the anomaly that immigration law did not penalize the employment of illegal aliens. "For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." Id. at 892-93. *See also De-Canas v. Bica*, 424 U.S. at 359-60 & 360, n.9 (noting that the INA presently is not aimed at the employment of illegal aliens, but rather, is only peripherally concerned with such employment, and that Congress believes that "this problem does not yet require uniform national rules . . . .").

The Court first looked to the immigration laws for a solution. Only when no explicit position in immigration law on the employment of illegal aliens was found did the traditional labor law structure prevail. "Since the

employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA." *Sure-Tan*, 467 U.S. at 893.

The Court's careful balancing of interests in *Sure-Tan* is most apparent in its construction of remedies for NLRA violations against illegal immigrants. The Court did not allow back pay and damages for illegal aliens unless they became lawful residents. 467 U.S. at 902-03. To do so, said this Court, would undermine the effort to stop illegal immigration. *Id.* at 903-04. Thus, although American workers would have been entitled to special remedies under the NLRA, the interests protected by the immigration laws do not permit the same relief for illegal immigrants.

Stated another way, this Court held that remedies under employment-related protective statutes may not undermine the purposes of the immigration law. Even though the statutes make no distinction between illegal alien "employees" and American employees, the Court balanced interests in order to inflict the least damage to either law. A proposed remedy available to an American worker should not translate to the same remedy being automatically available to an illegal immigrant.

This Court's concern for the purposes of the immigration laws continues today. After Congress passed the IRCA, this Court vacated and remanded a case involving a bond condition prohibiting illegal aliens released on bond from working pending deportation hearings. The Ninth Circuit held, quoting *Sure-Tan* and *DeCanas*, that the immigration law evinces "peripheral concern . . . with employment of illegal entrants." *Na-*

tional Center for Immigrants' Rights v. Immigration and Naturalization Service, 791 F.2d 1351, 1355 (9th Cir. 1986). Therefore, the Ninth Circuit held that the Attorney General could not forbid illegal immigrants from working in the United States. This case was decided before the enactment of the IRCA. This Court remanded for reconsideration in light of the IRCA. *INS v. National Center for Immigrants' Rights*, 107 S. Ct. 1881 (1987). This remand was an explicit request to the Ninth Circuit to consider the interests Congress enunciated in the new immigration law.

3. The lower courts misunderstand the mandate of this Court.

Unfortunately, the lower courts do not seem to have understood the distinctions this Court has found between the interests to be protected under the immigration and labor laws. Treating a claim under the NRLA as one involving primarily labor law, the Ninth Circuit expanded illegal aliens' available remedies under the NLRA far beyond that allowed in *Sure-Tan*, distinguishing the *Sure-Tan* rationale by noting it was a three-way split decision. *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d at 716 & n.10. Like all other pre-IRCA cases, the Ninth Circuit stated that the INA was only of "peripheral" concern with employment of illegal aliens. *Id.*

Judge Beezer vigorously dissented, arguing that "permitting backpay awards to such aliens has the effect of sanctioning the continuing violation of the law engendered by the alien's very presence in this country." *Id.* at 726. The majority, however, felt that the fact that the aliens were still illegally in the United States was the major reason why *Sure-Tan should* be extended. *Id.* at 719 (stating that "in contrast, the [illegal aliens] . . . are all in the United States presently working . . . . Thus, for

the NLRB to award backpay to [them] . . . would not implicate the concerns expressed by the Supreme Court in *Sure-Tan*[]").

Similarly, in a case now pending before this Court on a petition for certiorari, reasoning from *Sure-Tan*, the Fifth Circuit held prospective relief under the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), had to be paid to an admitted illegal alien. *Hernandez v. M/V Rajaan*, 841 F.2d 582.

Finally, in this case, the Eleventh Circuit reversed a finding that the IRCA precluded backpay and liquidated damages under the FLSA to an admitted illegal alien. The Eleventh Circuit felt that *Sure-Tan* "weighs heavily in favor of Patel's contention that Congress did not intend to exclude undocumented aliens from the FLSA's coverage." App. B, p. 6.

Recognizing "the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA," *id.* at 10, the Eleventh Circuit ventured that "[w]e doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws." *Id.*

The Eleventh Circuit felt that allowing backpay and liquidated damages under FLSA would reduce the incentive to hire illegal immigrant workers and therefore would be consistent with IRCA. *Id.* But it is equally likely that providing thousands of dollars in back pay and liquidated damages to Respondent would encourage him to remain illegally in this country, with or without authorized employment.

This Court's teaching in *Sure-Tan* is that a court reviewing a demand for employment-related benefits by an illegal immigrant must not provide any remedy that would encourage further illegal presence in this country.

467 U.S. at 903. The decision of the Eleventh Circuit herein does not meet that standard. The Eleventh Circuit should have looked for a decision which could have balanced the need to insure that American workers are protected from exploitation against the need to remove an illegal immigrant from the workforce and from this country.

C. The Immigration Reform And Control Act Of 1986 Altered The Balance Between Immigration Law And Labor Law In These Cases.

Only the District Court's decision and two dissents in lower court decisions, (Judge Jones' in *In re Reyes* and Judge Beezer's in *Local 512, Warehouse & Office Workers' Union v. NLRB*), recognize either this Court's concern for the interests protected by the immigration laws or the true effect of the IRCA. This Court has deferred to traditional labor law analyses only after finding no immigration law interests affected; other lower court decisions misunderstand or ignore the immigration law interests made manifest in the IRCA.

The single most important change made by the 1986 law was to criminalize the hiring of illegal aliens. (Amnesty is not the biggest change; we have given amnesty before. *See, e.g.*, Immigration and Nationality Act of 1952, Sec. 249, Pub. L. 82-414, 66 Stat. 1638, 8 U.S.C. § 1259, *(amended by* IRCA)). As shown above, the IRCA was a comprehensive structure to eliminate illegal aliens from the American workforce; the Act, therefore, was in part designed to remedy the gaps identified by this Court in *DeCanas* and *Sure-Tan*.

This new structure requires that the analysis of any alien-related employment question first turns on whether the alien was "authorized" to accept employ-

ment in the United States. The Act, therefore, returns scrutiny of illegal aliens' claims to employment-related benefits from an entirely labor law-related examination to an immigration-law-related inquiry.

This immigration-law context shifts the balances struck in earlier cases. The need this Court found in *Sure-Tan* to invoke traditional labor law standards in the absence of immigration law concerns is eliminated. The generous views of other courts in unemployment compensation and other cases are undercut by the harsh reality of the new law: Congress intended to remove each and every avenue for illegal alien workers to remain in this country.

Traditional labor law protections extended to illegal aliens will perpetuate and encourage illegal immigration in direct contravention of the purposes of IRCA. *Patel v. Sumani*, App. A (Jones, J.); *In re Reyes*, 814 F.2d 168 (Jones, J., dissenting); *Local 512, Warehouse Office Workers' Union v. NLRB*, 795 F.2d 705 (Beezer, J., dissenting). If illegal immigration is fostered, American workers will continue to be hurt by the presence of illegal immigrants. By enacting the IRCA, Congress did not seek to make a minor alteration in labor laws; it intended to criminalize the hiring of illegal immigrants as a *complete* penalty.

The purposes enunciated by the IRCA are not served by providing government enforcement of employment-related statutory rights intended to protect American workers; the expressed intention of Congress in the IRCA was simply to remove all illegal aliens from the workforce. Justice Powell's partial concurrence in *Sure-Tan*, 467 U.S. at 913 (noting that the appropriate search is for the least incentive for illegal immigration), provides the framework for analyzing these claims by illegal aliens.

Yet the lower courts have not gotten the message. In *Doe v. Reivitz*, the Seventh Circuit said the "IRCA simply adds additional sanctions for conduct that was effectively already illegal." 830 F.2d at 1450, n.16. This reading of the changes made by the IRCA is "simply" wrong. This Court has long recognized that hiring illegal immigrants was not illegal before IRCA. *See Sure-Tan*, 467 U.S. at 892-93.

In *League of United Latin American Citizens v. Pasadena Independent School District*, the United States District Court for the Southern District of Texas refused to allow the School Board to discharge admittedly illegal alien workers under IRCA even though the workers lied on their employment applications. 662 F. Supp. 443, *related*, 672 F. Supp. 280 (S.D. Tex. 1987). In *Hernandez v. M/V Rajaan,* the Fifth Circuit considered and rejected the IRCA by holding that compensation rates should be calculated as though an illegal alien were entitled to remain in the United States. 841 F.2d 582.

The Eleventh Circuit in this case also misunderstood the effect of the IRCA. The court rejected the idea that the IRCA altered the analysis given in *Sure-Tan*. The Eleventh Circuit first found that nothing in FLSA excluded illegal immigrants from the Act's protection. App. B, p. 7. Then the court found that "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA." *Id.* at 8.

The Eleventh Circuit focused on a mention in the legislative history of the Wage and Hour Division of the Department of Labor, and an increase in authorized funds for that agency. *Id.* at 9. But the Eleventh Circuit failed to understand that the Wage and Hour Division is now supposed to assist in enforcing the prohibitions against hiring illegal aliens. It is not at all clear that il-

legal aliens should be entitled to back pay and liquidated damages if this enforcement is to be increased. Why would Congress want to encourage illegal immigrants to remain in this country if it was criminalizing their employment?

The Eleventh Circuit's view, based on a limited reading of the legislative history, ignores the delicate balance of interests enunciated in *Sure-Tan*. It is not the Eleventh Circuit's role to find a way to provide benefits to an illegal alien applicant; the Eleventh Circuit should have sought to minimize the possibility of more illegal residence in this country.

Since lower court decisions are no longer valid, and the effect of the IRCA is misunderstood, this Court must give lower courts guidance on the proper balance between immigration law and labor law considerations in cases where those few illegal alien workers remaining in this country after the IRCA demand that the government assist them in obtaining rights which Congress intended be reserved for American workers.

D. This Is The Proper Case For Review Of This Question.

This is not the first case to raise this question of post-IRCA demands for employment-related benefits before the Court. See, *e.g. Dianella v. Hernandez*, 57 U.S.L.W. 3314 (*petition for cert. filed* Oct. 15, 1988) (No. 88-641). This case, however, represents a clear presentation of the issue, unclouded by significant extraneous questions.

The only fact which might preclude review is that the alleged violation of the FLSA occurred prior to the enactment of the IRCA. But under the *Sure-Tan* analysis, the key time period for determining whether illegal immigration is encouraged is when the remedy is provided.

The specific issue appealed in this case is whether, after the 1986 IRCA, illegal immigrant workers are entitled to back pay and liquidated damages under the FLSA. If IRCA changed the analysis of earlier cases, then the Eleventh Circuit's decision is wrong. If IRCA required the FLSA enforcement methods employed be those least likely to encourage continued illegal immigration, then the Eleventh Circuit is wrong. If the Eleventh Circuit's discussion of the effect of IRCA is incorrect, this Court must tell the Eleventh Circuit of its error or other courts will follow the reasoning below.

At this stage in this case, neither the factual or legal issues preclude review. Respondent is an admitted illegal alien. Both parties disagree over the issue of the rights of illegal aliens to claim employment-related benefits after the IRCA of 1986. The District Court first addressed the question in its decision on a motion for summary judgment. App. A. The Eleventh Circuit, in reversing the lower court, examined several of the pre-1986 cases, including *Sure-Tan*, to determine the legal standard to be applied, and then questioned how the new law applied. App. B.

This case, therefore, is ripe for review by this Court. The legal issues on which review is requested are clear and specific. A decision by this Court as to the proper legal standard by which to analyze claims by illegal aliens would help lower courts handle the growing variety of claims by illegal immigrants.

The decision of the Court of Appeals should be reviewed because it presents a clear opportunity to instruct the lower courts on an increasingly important question. The IRCA of 1986 fundamentally altered earlier decisions on the rights of illegal aliens to invoke government enforcement of employment-related statutory protections. By criminalizing the relationship

between employer and illegal alien workers, the IRCA demonstrated that immigration laws have a central interest in employment of illegal immigrants. The IRCA's comprehensive scheme precludes enforcement of many employment-related protections by illegal alien workers; a worker cannot invoke these statutes if the worker is committing a crime by working. Earlier decisions and the decision of the Eleventh Circuit below must be reviewed in light of the new law.

CONCLUSION

THEREFORE, Petitioners respectfully request this Court to issue a writ of certiorari to the Court of Appeals for the Eleventh Circuit and to accept this case for review.

Respectfully submitted,

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APPENDIX A

United States District Court Opinion Below:
Rajni J. PATEL, Plaintiff,

v.

SUMANI CORP., INC., et al., Defendants.
Civ. A. No. 86-AR-1536-S.

United States District Court,
N.D. Alabama, S.D.
May 27, 1987

Bob Humphries, Montgomery, Ala., George M. Boles, Birmingham, Ala., for plaintiff.

Joseph L. Boohaker, Birmingham, Ala., for defendants.

George R. Salem, Sol. of Labor, Bobbye D. Spears, Regional Sol., George D. Palmer, Associate Regional Sol., U.S. Dept. of Labor, Birmingham, Ala., for U.S. Dept. of Labor.

MEMORANDUM OPINION

ACKER, District Judge.

Plaintiff Rajni J. Patel brings this action against defendants Sumani Corp., Inc., d/b/a Quality Inn South, Manibhai Patel and Dilip Patel, seeking to recover alleged unpaid minimum wages, alleged unpaid overtime compensation, and an additional equal amount as liquidated damages, all pursuant to 29 U.S.C. § 216, a provision of the Fair Labor Standards Act of 1938, as amended. Patel would invoke this court's federal ques-

tion jurisdiction under 28 U.S.C. § 1331. The court has for consideration defendants' motion for summary judgment pursuant to Rule 56, F.R.Civ.P.

Undisputed Pertinent Facts

Rajni Patel is a lawyer from India. On or about May 12, 1982, Patel was issued a six-week visitor's visa by the United States. On June 1, 1982, Patel arrived in the United States. Patel lived with his cousin who operated the Gaslight Motel while in New Orleans. Patel admits that his visitor's visa expired on or about June 20, 1982, and thereafter that he has remained illegally within this country. On or about July 11, 1983, Patel came to Birmingham, Alabama, and stayed at the Quality Inn South. Defendant Sumani at that time leased and managed the Quality Inn South. Patel claims he came to Birmingham to work for defendants Manibhai and Dilip Patel who are not related to Rajni Patel. Manibhai and Dilip, who at that time were the majority stockholders of Sumani, claim that Patel was never employed by either them, by the Quality Inn South, or by Sumani, and that they simply permitted Patel to stay at the motel as a favor to Patel's cousin and to hide Patel from the Immigration and Naturalization Service.

While Patel was at the Quality Inn South, he did perform some work for Sumani. Sumani claims that it paid him as an "independent contractor". Neither social security taxes, federal and state taxes nor unemployment compensation taxes were deducted from what Patel was paid. Patel left the Quality Inn South on or about October 27, 1985 and returned to New Orleans. On August 19, 1986 Patel filed this action.

Defendants not only deny Patel's claim on its merits but assert that as an illegal alien Patel has no claim under the FLSA.

Conclusions of Law

Congress, in the FLSA, as amended, requires every employer engaged in commerce or in the production of goods for commerce to pay each employee a minimum wage as periodically established by Congress. 29 U.S.C. § 206. In addition, Congress requires employers engaged in commerce or in the production of goods for commerce, if they use their employees in excess of forty hours per week, to compensate them at a rate of not less than one and one-half times the regular rate. 29 U.S.C. § 207. Under 29 U.S.C. § 216(b), an employer who violates the provisions of §§ 206 and 207 is "liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages". Section 203(e)(1) states that "the term 'employee' means any individual employed by an employer". Defendants do not contest that they would qualify as "employers" under the Act, although each defendant denies that Patel was ever an "employee".

None of the parties to this action has located any decided case that specifically addresses the question presented here, namely, whether or not an illegal and undocumented alien can enforce the minimum wage and overtime provisions of the FLSA while an illegal alien. By order dated March 24, 1987, this court requested that the United States Department of Labor file a statement of position on whether or not an admittedly illegal alien has standing to complain of alleged violations of the wage and hour provisions of the FLSA. The Department of Labor filed its statement of position on April 7, 1987, taking the position that illegal aliens can enforce the wage and hour provisions of the FLSA. In its statement, the Department of Labor cites no case and no legislative history in support of its position. Thereafter,

by telephone call to the court's law clerk, the Department of Labor brought to the court's attention *In re Reyes*, 814 F.2d 168 (5th Cir. 1987), in which the Fifth Circuit on March 30, 1987 says, *without citing a single authority*:

> [I]t is well established that the protections of the Fair Labor Standards Act are applicable to citizens and aliens alike and whether the alien is documented or undocumented is irrelevant.

814 F.2d at 170.

Judge Edith Jones dissented in *Reyes*. This court agrees with Judge Jones when she says:

> I also take issue with the majority's conclusion that . . . the Fair Labor Standards Act do[es] not distinguish between citizens and illegal alien employees. Previously, no court has explicitly permitted an undocumented alien to recover the damages and penalties provided for in th[is] statute[].

841 F.2d at 171.

Judge Jones is entirely correct in noting that the majority was taking a position without precedent. Why are there no decided cases on this subject when there have undoubtedly been millions of illegal aliens employed in this country for years at less than the minimum wage? 1/ The logical reason is that no illegal

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1/ "Sheer incapability or lax enforcement of the laws banning entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants--numbering in the millions--within our borders. This situation raises the spector of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents." *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982) (footnotes omitted).

alien ever entertained the thought he was entitled to invoke the FLSA until the recent era of amnesty, when Patel was emboldened to "come out of the closet," so to speak. It is difficult to think that since the FLSA was adopted years ago no lawyer has ever filed a suit on behalf of an employed illegal alien, that is, unless the multitalented and hungry legal profession unanimously shared the view of Judge Jones.

Another reason for siding with Judge Jones in *Reyes* is that the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.), provides that undocumented aliens who can demonstrate that they have lived here prior to January 1, 1982, are now eligible for legalization. The Act clearly makes it illegal to hire unauthorized aliens after November 6, 1986, and provides sanctions effective June 1, 1987, against an employer to enforce this provision. An article by Vernon M. Briggs, professor in the New York State School of Industrial and Labor Relations at Cornell University, appearing on the editorial page of *The Birmingham News* on May 19, 1987, accurately describes the new Immigration Reform and Control Act of 1986 as one which "bans for the first time discrimination in employment against non-citizens". This means, of course, that prior to 1986, non-citizens were discriminated against in employment as a matter of public policy. The pre-1986 interpretation of the FLSA which Patel and the Department of Labor would have this court adopt would surely contradict Dr. Briggs' belief that prior to the new Act aliens were discriminated against in employment.

A rule of statutory construction here applicable is the rule which presumes that new legislation which relates to the subject matter of prior legislation sheds light on the intent of the prior legislation because Congress when it speaks on a particular subject must intend either

to harmonize that subject or to change something about the preexisting law relating to it. Otherwise, Congress presumptively would not waste its time dealing with something it has satisfactorily dealt with before. If, prior to the enactment of the IRCA, illegal aliens had all of the protections of the FLSA, there would have been much less of a reason for the IRCA, if any reason at all.

Generally, the question of "standing" involves an analysis of whether or not a litigant has a sufficient stake in an otherwise justiciable controversy to merit his being the one to litigate that controversy. Admittedly, some courts have recognized the right of an illegal or undocumented alien to bring an action in federal court alleging violations of certain federal statutes. *Local 512, Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705, 718 n. 12 (9th Cir. 1986); *see also Moreau v. Oppenheim*, 663 F.2d 1300, 1308 (5th Cir. 1981), *cert. denied*, 458 U.S. 1107, 102 S.Ct. 3486, 73 L.Ed.2d 1368 (1982) ("We seriously doubt whether illegal entry, standing alone, makes outlaws of individuals, permitting their contracts to be breached without legal accountability."); *Martinez v. Fox Valley Bus Lines*, 17 F.Supp. 576 (D.C. Ill. 1936) (Illegal alien permitted to sue for negligence to recover for personal injuries). And it is a well-recognized principle that an alien's unlawful, involuntary, or transitory presence in this country does not deprive him of *all* constitutional protections. *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976). In *Diaz*, the Supreme Court concluded that a provision of the Social Security Act which denied eligibility to aliens for supplemental medical insurance unless the aliens were admitted for permanent residence and resided in the United States for at least five years did not violate the due process clause of the Fifth Amendment. As Justice Stevens, in writing for the Court, stated:

> The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause *does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification*. For a host of constitutional and statutory provisions rest on the premise that *a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other*; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country.
>
> In the exercise of its broad power over naturalization and immigration, *Congress regularly makes rules that would be unacceptable if applied to citizens*. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. *The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."*
>
> In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for *all aliens. Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests*. The decision to share that bounty with our guests may take into account *the character of the relationship between the alien and this country*. Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

96 S.Ct. at 1890-92 (footnotes omitted).

lthough the Court in *Diaz* was not concerned with claims brought by an illegal alien, as this court is here, the recognition by the Court of the right of Congress to make distinctions between citizens, legally admitted aliens, and illegal aliens is paramount to this court's consdieration of Patel's claim under the FLSA. The fact that the FLSA defines an "employee" as "*any individual*

employed by an employer" does not mean that an illegal alien employed by an employer automatically falls within the purview of the FLSA. An illegal alien may be a "person" guaranteed equal protection and due process of law by the Fifth and Fourteenth Amendments, *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982); however, he may not be an "individual" protected by the provisions of the FLSA. Many federal statutes make distinctions in their applications as between citizens and aliens, and the FLSA must be construed so as not to conflict with the recent amendments to the INA. *Diaz*, 96 S.Ct. at 1890 n. 12. Congress has now implemented a policy of discouraging the entry and employment in this country of illegal aliens, the previous lack of which was justly criticized by Justice Brennan in *Plyer*. For this court to interpret the protection of the FLSA to apply to illegal aliens would so obviously conflict with the purpose and policy behind the IRCA so as to fly in the face of what Congress has attempted to do. This court concludes, therefore, that Patel is not an "individual" within the definition of an employee under the FLSA. If Patel is not an "individual" under the FLSA, it follows that he has no standing to complain of any violations of the FLSA. *Cf. Coules v. Pharris*, 212 Wis. 558, 250 N.W. 404 (1933) (illegal alien has no standing to sue on contract).

Assuming *arguendo* that Patel, and admittedly illegal alien, has some sort of minimal "standing" to bring an action in federal court claiming violations of the FLSA, the next question presented by Patel's action is whether Patel, because of his illegal presence in the United States, has the right to *recover* for any alleged violation. This is an allied but a separate question.

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894, 104 S.Ct. 2803, 2810, 81 L.Ed.2d 732 (1984), the Supreme Court reasoned that the National Labor Relations Act

applies to illegal or undocumented aliens and protects them from unfair labor practices by an employer. In *Sure-Tan*, the Court found that petitioner employers had engaged in an unfair labor practice by reporting to the Immigration and Naturalization Service certain employees known to be undocumented aliens in retaliation for their engaging in union activities. Writing for the Court, Justice O'Connor considered the potential conflict between the application of the NLRA and the mandate of the Immigration and Naturalization Act:

> *Counterintuitive though it may be*, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* This Court has observed that "[t]he central concern of the INA is with the terms and conditions of admissions to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas v. Bica*, 424 U.S. at 359, 96 S.Ct. at 938. *The INA evinces "at best evidence of a peripheral concern with employment of illegal entrants."* *Id.* at 360, 96 S.Ct., at 939. For whatever reason, *Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization*. While it is unlawful to "concea[l], harbo[r], or shiel[d] from detection" any alien not lawfully entitled to enter or reside in the United States, see 8 U.S.C. § 1324(a)(3), an explicit proviso to the statute explains that "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." *Ibid.* See *De Canas v. Bica*, *supra*, at 360, and n. 9, 96 S.Ct., at 939, and n. 9. Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally. See 119 Cong. Rec. 14184 (1973) (remarks of Rep. Dennis). *Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.*

> We find persuasive the Board's argument that enforcement of the NLRA with respect to undocumented alien employees is compatible with the policies of the INA. *A primary purpose in restricting immigration is to preserve jobs for American workers; immigrant aliens are therefore admitted to work in this country only if they "will not adversely affect the wages and working conditions of the workers in the United States similarly employed."* 8 U.S.C. § 1182(a)(14). See S.Rep. No. 748, 89th Cong., 1st Sess., 15 (1965), U.S. Code Cong. & Admin. Serv. 1965, p. 3328. *Application of the NLRA helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws. The Board's enforcement of the NLRA as to undocumented aliens is therefore clearly reconcilable with and serves the purposes of the immigration laws as presently written.*

104 S.Ct. at 2809-10 (emphasis supplied).

The Court, relying principally on *De Canas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), and the immigration laws in force at that time, found no conflict between application of the NLRA to illegal aliens and the mandate of the INA.

In the present action, however, this court is concerned not with the NLRA but with the application of the wage and overtime provisions of the FLSA. As noted, the immigration laws have recently been amended by the IRCA. On November 5, 1986, the IRCA became effective. It amended the INA to revise and reform the immigration laws so as to provide for the control of illegal immigration through employment restrictions and the granting of amnesty to certain

qualified illegal aliens. Patel does not claim that he falls within the amnesty provisions of the IRCA. He conspicuously does not invoke the new Act.

Section 274A was added to the INA, making the employment of unauthorized aliens unlawful. The statute provides in part:

> (1) In general
> It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the Untied States--
>
> > (A) an alien knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or
> >
> > (B) an individual without complying with the requirements of subsection (b) of this section.
>
> (2) Continuing employment
> It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.
>
> * * * * * *
>
> (4) Use of labor through contract
> For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).

8 U.S.C. § 1324a(a) (Supp. 1987).

An unauthorized alien is defined as follows:

> As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular

> time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General.

8 U.S.C. § 1324a(h)(3) (Supp.1987).

Thus, the Court's reasoning in *Sure-Tan* was not only "counterintuitive" or contrary to what naturally may be divined from the policy and purposes behind the INA, but the INA *now* evinces a foremost concern with the employment of illegal aliens. The INA now provides for criminal and civil sanctions against an employer who knowingly hires or recruits for employment an illegal alien. Furthermore, the statute makes it illegal for an employer to continue to employ the alien in the United States knowing the alien is or has become an unauthorized alien with respect to such employment. Subsection (a)(4) also prohibits employers form circumventing the provisions of the statute by contracting with illegal aliens as so-called "independent contractors". Moreover, the INA is amended to add section 274B which deals with unfair immigration-related employment practices. This provision specifically excludes from coverage discrimination in employment by employers against unauthorized aliens. Under these amendments to the INA, there is no doubt now but that the employment relationship between an employer and an undocumented alien is *illegal* under the INA, and there *is* reason to conclude that the application of the wage and overtime provisions of the FLSA to illegal aliens conflicts with the terms of the INA.

The IRCA now places an affirmative duty on employers to verify the employment eligibility of all applicants by checking certain documents. 8 U.S.C. § 1324a(b) (Supp.1987). No longer can any court say that "private persons such as petitioners [employers] have no judicially cognizable interest in procuring enforcement

of the immigration laws by the INS." 104 S.Ct. at 2811. Contrary to the court's reasoning in *Sure-Tan* concerning the application of the NLRA, not only is the conclusion that the FLSA cannot be enforced by an illegal alien intuitive from the policy behind the INA, given the goals sought to be achieved by the IRCA, but such a conclusion appears to be mandated by Congress. As the court noted in *Sure-Tan*, "[a] primary purpose [of the federal government] in restricting immigration is to preserve jobs for *American* workers. . . ." (emphasis supplied). The purpose behind the INA amendments is to discourage not only illegal aliens from seeking employment in the United States, but also to punish employers for employing illegal or undocumented aliens. The IRCA was intended to remove an economic incentive for illegal entry into the United States for the purpose of engaging in unlawful employment and to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country. Thus, the IRCA was designed to correct or ameliorate those provisions of the INA which in effect condoned and encouraged undocumented aliens to enter this country to work. This court's decision holding that an illegal alien cannot obtain a remedy for violations by his employer of the provisions of the FLSA is fully consistent with the objectives of federal immigration law as now amended. Such a holding by this court significantly furthers the goal of the INA of discouraging illegal immigration and has no adverse effect on laborers legally employed in this country. *Cf. Immigration and Naturalization Service v. National Center for Immigrant's Rights*, ___ U.S. ____, 107 S.Ct. 1881, 95 L.Ed.2d 489 (April 20, 1987) (Court vacates Ninth Circuit decision striking down INS regulation conditioning bond release on aliens refraining from "unauthorized work" and orders court to reconsider in light of the IRCA.).

Consistent with this court's reasoning, many cases have held that it is entirely appropriate for the federal and state governments to place work disabilities on illegal or undocumented aliens. In *DeCanas v. Bica*, 424 U.S. 354, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), the Court found that a California statute prohibiting an employer from knowingly employing an alien not entitled to lawful residence in the United States was not unconstitutional as being preempted under the supremacy clause by the INA. Justice Brennan, writing for the court, recognized the vital state interests sought to be protected by the California statute:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions. These local problems are particularly acute in California in light of the significant influx into the State of illegal aliens from neighboring Mexico. In attempting to protect California's *fiscal interests and lawfully resident labor force form the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.*

96 S.Ct. at 937 (emphasis supplied).

The same state interests expressed in *Bica* are also sought to be protected by Congress through its enactment of the IRCA. The employment of illegal aliens deprives the lawfully resident labor force of jobs and has a harmful effect on the national economy. Enforcing the minimum wage and hour provisions of the FLSA in favor of an illegal alien encourages the alien illegally to obtain entry into the United States and to work here. On the other hand, not allowing an illegal alien to encourage the wage and hour laws discourages such entry

and has no detrimental effect on the employment of citizens and aliens legally admitted into the United States. By enacting the IRCA, Congress evidenced its belief that the employment of illegal aliens adversely affects the wages and working conditions of workers legally in the United States. Given the criminal and civil sanctions imposed on employers under the IRCA, there is no advantage or incentive for employers to prefer illegal aliens over legal resident workers, whereas giving illegal aliens rights under the FLSA encourages their illegal entry since the only penalty they can suffer is deportation. Denying illegal aliens a remedy under the provisions of the FLSA not only discourages their entry and recognizes the policy and goals of the INA, but it also indirectly penalizes their criminal conduct. *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) ("[E]ntering or remaining unlawfully in this country is itself a crime."); *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2388, 72 L.Ed.2d 786 (1982) ("Unsanctioned entry into the United States is a crime.... ").

In *Bica* the court implicitly acknowledged that the trend in recent years was to restrict the employment rights of illegal aliens:

> Finally, rather than evidence that Congress "has unmistakably ... ordained" exclusivity of federal regulation in this field, there is evidence in the form of the 1974 amendments of the Farm Labor Contractor Registration Act, 88 Stat. 1652, 7 U.S.C. § 2041 *et seq*. (1970 ed., Supp. IV), that Congress intends that states may, to the extent consistent with federal law, regulate the employment of illegal aliens. Section 2044(b) authorizes revocation of the certificate of registration of any farm labor contractor found to have employed "an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment." Section 2045(f) prohibits farm labor contractors from employing "an alien not lawfully admitted for permanent residence or who has not been

> authorized by the Attorney General to accept employment." Of particular significance to our inquiry is the further provisions that "[t]his chapter and the provisions contained herein are *intended to supplement State action* and compliance with this chapter shall not excuse anyone from compliance with *appropriate State law and regulation*." 7 U.S.C. § 2051 (emphasis supplied). Although concerned only with agricultural employment, the Farm Labor Contractor Registration Act is thus persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters affecting employment of illegal aliens and therefore barring state legislation such as § 2805(a).

Id. 96 S.Ct. at 939-40 (emphasis in original).

The enactment of the IRCA indicates that Congress believes the problem of illegal aliens working in the United States now requires uniform national rules. While potentially preempting state regulation of the employment of illegal aliens such as the Court was concerned with in *Bica*, the amended INA evinces a policy of discouraging the employment of illegal aliens. To enforce the minimum wage and overtime provisions of the FLSA in favor of an alien illegally working in the United States is a direct and unquestionable conflict with this INA policy.

Patel is a lawyer. He is familiar with the English common law tradition. Patel necessarily understands the illegality of his presence within this country. He is here because he can make more money working as a laborer below minimum wage in a motel in the United States than he can practicing law in India. It is clear that Patel is challenging the ability of this country to enforce its own immigration laws. For aught appearing, Patel has not sought legal entry. Patel now asks this court to help him to perform a fraud upon the American labor force by frustrating the plain purpose of the INA to discourage the illegal entry into this country of aliens seek-

ing work. Such assistance by this court, if it should award the same protections under the FLSA to illegal aliens that are guaranteed workers legally within this country, would effectively repudiate the policy and purpose behind the recent amendments to the INA.

Patel has offered nothing whatsoever in response to defendants' motion for summary judgment as he is required to do under *Celotex Corp. v. Catrett*, ___ U.S. ____, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

For the reasons stated, defendants' motion for summary judgment is due to be granted.

An appropriate separate order will be entered.

APPENDIX B

Rajni J. PATEL, Plaintiff-Appellant,

v.

QUALITY INN SOUTH, Manibhai Patel and Dilip Patel, Sumani Corp., Inc., Defendant-Appellees.

No. 87-7411.

United States Court of Appeals, Eleventh Circuit. June 8, 1988.

Appeal from the United States District Court for the Northern District of Alabama.

Before VANCE and EDMONDSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

VANCE, Circuit Judge:

In this action under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-19, plaintiff Rajni Patel, an undocumented alien, appeals from the district court's grant of summary judgment for the defendants. *See* 660 F.Supp.1528 (N.D.Ala.1987). In granting the defendants' motion for summary judgment the district court concluded that undocumented aliens could not recover in an action under the FLSA. We disagree and reverse.

I.

On June 1, 1982 Patel came to the United States from India on a visitor's visa. Although his visa expired after six weeks, Patel remained in the United States and in July 1983 he began working for defendant Sumani Corporation at its hotel, the Quality Inn South, in Birmingham, Alabama. Patel performed a variety of tasks at the hotel, including maintenance and janitorial work. He continued working at the hotel until October 1985.

In August 1986 Patel brought this action against the Quality Inn South and its owners. He alleges that the defendants violated the wage and overtime provisions of the FLSA and seeks to recover unpaid back wages of $47,132 plus liquidated damages and attorneys' fees. At a March 18, 1987 pretrial conference the district court suggested to the defendants that they file a motion for summary judgment on the ground that Patel, as an undocumented alien, was not entitled to the protections of the FLSA. Able to take a hint, the defendants promptly filed a motion for summary judgment. On March 24 the court ordered the Department of Labor to file a statement of its position on the issue. In its response the Department of Labor took the position that undocumented aliens were covered by the provisions of the FLSA and thus were entitled to its protections.

On May 27, 1987 the district court granted the defendants' motion for summary judgment and held that undocumented aliens could not recover for violations of the FLSA. In reaching its conclusion the court indicated that it could find no authority for the proposition that illegal aliens were protected by the FLSA. It also relied heavily on the recently enacted Immigration Reform and Control Act of 1986 (IRCA), Pub.L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

The IRCA, passed as an amendment to the Immigration and Nationality Act (INA), makes it unlawful to hire illegal aliens and provides for sanctions against employers who do.

The district court concluded that the application of the wage and overtime provisions of the FLSA to undocumented aliens would conflict with the INA as amended by the IRCA. The Court reasoned that to give the protections of the FLSA to undocumented aliens would encourage illegal immigration and thus undermine the policies behind the INA. The court stated:

> The IRCA was intended to remove an economic incentive for illegal entry into the United States . . . and to correct a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country. Thus, the IRCA was designed to correct or ameliorate those provisions of the INA which in effect condoned an encouraged undocumented aliens to enter this country to work. This court's decision holding that an illegal alien cannot obtain a remedy for violations by his employer of the provisions of the FLSA is fully consistent with the objectives of federal immigration law as now amended.

660 F.Supp. at 1534. Following the court's entry of judgment for the defendants, Patel brought this appeal.

II.

A.

In deciding whether undocumented aliens are entitled to the protections of the FLSA we begin by examining the act itself. Congress enacted the FLSA in 1938 to eliminate substandard working conditions. *See* 29 U.S.C. § 202. It requires covered employers to pay their employees a statutorily prescribed minimum wage, *Id.* § 206, and prohibits employers from requiring their employees to work more than forty hours per week un-

less the employees are compensated at one and one half times their regular hourly rate. *Id.* § 207(a)(1). For violations of its provisions the FLSA imposes criminal sanctions and allows employees to bring an action to recover any unpaid minimum wages and overtime plus liquidated damages and attorney's fees. 1/ *Id.* § 216(a), (b).

In section 3(e) of the FLSA, *Id.* § 203(e), Congress defined the term "employee" for the purpose of determining who would be covered by the act. It would be difficult to draft a more expansive definition. The term "employee" was defined to include "any individual employed by an employer." *Id.* § 203(e)(1). In subsequent paragraphs Congress set forth specific exceptions to this broad definition. Section 3(e)(2) governs which employees of public agencies are covered by the act. *Id.* § 203(e)(2). In section 3(e)(3) Congress provided a limited exception for the immediate family members of employers engaged in agriculture. *Id.* § 203(e)(3). Finally, section 3(e)(4) exempts from coverage a narrow group of state and local government workers. *Id.* § 203(e)(4). This definitional framework--a broad general definition followed by several specific exceptions--strongly suggests that Congress intended an all encompassing definition of the term "employee" that would include all workers not specifically excepted. 2/

That Congress intended a broad definition of the term "employee" is also apparent from the FLSA's legislative history. One representative described the act as

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1/ The Secretary of Labor is also authorized to bring such an action on workers' behalf. *See* 29 U.S.C. § 216(c).

2/ Congress also set forth a number of specific exemptions in section 13 of the FLSA, 29 U.S.C. § 213. Significantly, none of these exemptions concern immigration status.

"the most momentous and far-reaching measure that [Congress has] considered for many years." 83 Cong.Rec. 9262 (1938) (statement of Rep. Fish). The remarks of then Senator Hugo Black, the FLSA's chief legislative sponsor, are even more instructive. During debate over the act Senator Black declared that its "definition of employee . . . is the broadest definition that has ever been included in any one act . . ." 81 Cong.Rec. 7656-57 (1937).

Given the unequivocal language of the FLSA and its legislative history, it is not surprising that the Supreme Court has adopted an expansive definition of the term "employee" in its decision under the act. Although it has never faced the question of whether undocumented aliens are covered by the FLSA, the Court consistently has refused to exempt from coverage employees not within a specific exemption. As the Court explained in *Powell v. United States Cartridge Co.*, 339 U.S. 497, 70 S.Ct. 755, 94 L.Ed 1017 (1950):

> Breadth of coverage was vital to [the FLSA's] mission. . . Where exceptions were made, they were narrow and specific. [Congress] included as employees "any individual employed by an employer" § 3(e), and . . . devoted § 13 to listing *exemptions of specific cases of employees* . . . Such specificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act.

339 U.S. at 516-17, 70 S.Ct. at 766 (emphasis in original). *See also A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945) (exemptions from the FLSA should be narrowly construed); *United States v. Rosenwasser*, 323 U.S. 360, 362-63, 65 S.Ct. 295, 296, 89 L.Ed. 301 (1945) (Congress intended to include all employees within the scope of the FLSA unless specifically excluded); *cf. Citicorp Indus. Credit, Inc. v. Brock*, --- U.S. ----, 107 S.Ct. 2694, 2700, 97 L.Ed.2d 23

(1987) (FLSA's specific and detailed exemptions preclude enlargement by implication).

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984), the Court used similar reasoning when it held that undocumented aliens are "employees" within the meaning of the National Labor Relations Act (NLRA). The Court stated:

> The breadth of § 2(3)'s definition is striking: the Act squarely applies to "any employee." The only limitations are specific exemptions .... Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of "employee."

467 U.S. at 891-92, 104 S.Ct. at 2808. Congress enacted both the FLSA and the NLRA as part of the social legislation of the 1930's. The two acts have similar objectives. More importantly the two acts similarly define the term "employee," and courts frequently look to decisions under the NLRA when defining the FLSA's coverage. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723, 67 S.Ct. 1473, 1473, 91 L.Ed. 1772 (1947); *see Marshall v. Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n. 1 (5th Cir.1977). 3/ Thus, the Supreme Court's decision in *Sure-Tan* weighs heavily in favor of Patel's contention that Congress did not intend to exclude undocumented aliens from the FLSA's coverage.

The Department of Labor also supports Patel's position. It first interpreted the FLSA to cover undocumented aliens in 1942, when the Wage and Hour Administrator opined that alien prisoners of war were

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3/ Under the NLRA the term "employee" is defined to include "any employee," subject only to several specifically enumerated exceptions. *See* 29 U.S.C. § 152(3). Thus, the NLRA's definitional framework virtually identical to that of the FLSA.

covered by the act and therefore were entitled to be paid the minimum wage. Since that time the Department of Labor has enforced the FLSA on behalf of undocumented workers on numerous occasions. *See, e.g., Donovan v. Burgett Greenhouses, Inc.*, 759 F.2d 1483 (10th Cir.1985); *Brennan v. El San Trading Corp.*, 73 Lab.Cas. (CCH), para. 33,032 (W.D.Tex.1973). To be sure, we are not bound by the Department of Labor's interpretation of the FLSA. As the agency charged with implementing the act, however, the Department's interpretation is entitled to considerable deference. *Tony and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 105 S.Ct. 1953, 1959, 85 L.Ed.2d 278 (1985); *cf. Sure-Tan*, 467 U.S. at 891-92, 104 S.Ct. at 2808 (deferring to Department of Labor's interpretation of the term "employee" under the NLRA). 4/

In short, the defendants' contention that Congress did not intend to protect undocumented workers when it passed the FLSA is contrary to the overwhelming weight of authority. Nothing in the FLSA or its legislative history suggests that Congress intended to exclude undocumented workers from the act's protections. The defendants conceded as much during oral argument. The defendants, however, rest their hopes on two recent developments which they contend preclude Patel from

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4/ The Department of Labor's interpretation is supported by the limited case law in this area. A number of courts have concluded, either expressly or implicitly, that undocumented aliens are entitled to the FLSA's protections. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir.1987); *Burgett Greenhouses*, 759 F.2d at 1485; *Castillo v. Givens*, 704 F.2d 181, 183 (5th Cir.), *cert. denied*, 464 U.S. 850, 104 S.Ct. 160, 78 L.Ed.2d 147 (1983); *Lopez v. Rodriguez*, 668 F.2d 1376, 1377-78 & n. 4 (D.C.Cir.1981).

recovering under the FLSA. They argue: (1) that in light of the IRCA undocumented aliens are no longer entitled to the protections of the FLSA, and (2) that even if undocumented aliens were covered by the FLSA, the Supreme Court's decision in *Sure-Tan* precludes them from recovering an award of back pay or liquidated damages. We will address these contentions in turn.

B.

We first consider the effect of the IRCA on the rights of undocumented aliens under the FLSA. As we noted earlier, the district court relied heavily on the IRCA in granting the defendants' motion for summary judgment.

We begin our analysis by noting the familiar principle that amendments by implication are disfavored. Only when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one. *See, e.g., Rodriguez v. United States*, --- U.S. ----, 107 S.Ct. 1391, 1392, 94 S.Ct. 1391 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976) (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed 351 (1936)). Here nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it.

The IRCA's legislative history strongly suggests that Congress believed that undocumented aliens would continue to be protected by the FLSA. The House Education and Labor Committees Report to the IRCA states:

> [T]he committee does not intend that any provision of the Act would limit the powers of State or Federal labor standards agencies such as the . . . *Wage and Hour Division of the Department of Labor* . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies. To do otherwise be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R.Rep. No. 99-682 (II), 99th Cong., 2d Sess. 8-9, *reprinted in* 1986 U.S.Code Cong. & Admin.News, 5649, 5757, 5758 (emphasis added). Section 111(d) of the IRCA is even more revealing. In section 111(d) Congress specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented aliens. Section 111(d) reads:

> There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

Pub.L. No. 99-603, § 111(d), 100 Stat. 3357, 3381 (1986). This provision would make little sense if Congress had intended the IRCA to repeal the FLSA's coverage of undocumented aliens.

Indeed, the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. *See* 8 U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most

attractive feature of such workers--their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.

We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job--at any wage--that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Having determined that undocumented aliens are "employees" within the meaning of the FLSA we must address the defendants' contention that the Supreme Court's decision in *Sure-Tan* precludes undocumented aliens from recovering an award of back pay pr liquidated damages. As we noted earlier, the Court in *Sure-Tan* held that undocumented aliens were employees covered by the NLRA. The Court, however, went on to reverse the lower court's award of back pay. 467 U.S. 898-905, 104 S.Ct. at 2812-15. In doing so, the Court stated that "the employees must be deemed 'unavailable for' work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled

to be present and employed in the United States." *Id.* at 903, 104 S.Ct. at 2814. 5/

The defendants, citing the similarities between the NLRA and the FLSA, contend that *Sure-Tan* precludes Patel's action for unpaid wages and liquidated damages. They argue that *Sure-Tan* prevents workers from recovering an award of back pay under the NLRA for periods when they were not legally present in the United States, and that the same result should obtain under the FLSA. We disagree.

At the outset we can find nothing in the FLSA itself to support the defendants' argument. Nothing in the act purports to limit the remedy available to any of the workers it covers. In giving workers an action for unpaid minimum wages and overtime the act simply states: "Any employer who violates the provisions of . . . this title shall be liable to the employee or employees affected. . . ." 29 U.S.C. § 216(b). Nor does *Sure-Tan* require such a result, even if it does preclude undocumented aliens from recovering back pay under the NLRA. 6/

[FN5]: In *Sure-Tan* the employers had violated the NLRA by reporting several employees to the Immigration and Naturalization Service in retaliation for union activity. The employees were arrested and deported to Mexico.

[FN6] In *Local 512, Warehouse and Office Worker's Union v. NLRB*, 795 F.2d 705 (9th Cir.1986), the Ninth Circuit narrowly interpreted *Sure-Tan*. A panel of that court, with one judge dissenting, concluded that the Supreme Court's remarks in *Sure-Tan* referred only to undocumented aliens who have left the country. *Sure-Tan* did not, the panel concluded, intend to foreclose awards of back pay under the NLRB to those aliens who remain in the United States. *See* 795 F.2d at 719-20. The question of the availability of back pay under the NLRB is not before us, and we express no opinion on the Ninth Circuit's interpretation of *Sure-Tan*.

The defendants are correct when they point out that courts frequently look to cases decided under the NLRA when interpreting the FLSA. Indeed, in this case we cited *Sure-Tan* in support of our conclusion that undocumented aliens are employees covered by the FLSA. We do not, however, find the Supreme Court's resolution of the back pay issue in *Sure-Tan* persuasive in the context of a claim for unpaid wages under the FLSA.

In *Sure-Tan* the employer had violated the NLRA by reporting several alien employees to the Immigration and Naturalization Service in retaliation for their engaging in union activity. As a result of the employer's action, the alien employees were deported. On the issue of back pay the Court was faced with the question of whether the departed employees could recover for *the loss of their jobs.* The Court stated that unless the employees were lawfully in the United States they should be deemed "unavailable" for work and hence ineligible for back pay. 467 U.S. at 903, 104 S.Ct. at 2814.

This case, an action for unpaid minimum wages and overtime under the FLSA, presents different considerations. Patel is not attempting to recover back pay for being unlawfully deprived of a job. Rather, he simply seeks to recover unpaid minimum wages and overtime for work *already performed.* Under these circumstances the rationale the Supreme Court used in *Sure-Tan* to limit the availability of back pay under the NLRA to periods when the employee was lawfully present in the United States is inapplicable. It would make little sense to consider Patel "unavailable" for work during a period of time when he was actually working.

Simply put, this is an area in which decision under the NLRA are not helpful in interpreting the FLSA. Nothing in the FLSA suggests that undocumented aliens cannot recover unpaid minimum wages and overtime

under the act, and we can conceive of no reason to adopt such a rule. We therefore conclude that Patel is entitled to the full range of available remedies under the FLSA without regard to his immigration status.

III.

In short, we hold that undocumented workers are "employees" within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages. We therefore reverse the district court's judgment and remand the case for a determination of the merits of Patel's claim.

REVERSED and REMANDED.

Supreme Court, U.S.
FILED
JAN 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-830

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

QUALITY INN SOUTH, MANIBHAI PATEL, DILIP PATEL, SUMANI CORP., INC.,
Petitioners

v.

RAJNI J. PATEL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

1. Whether Congress, in enacting the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"), amended *sub silentio* the definition of covered "employee" under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), to exclude undocumented alien workers from FLSA coverage.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-830

QUALITY INN SOUTH, MANIBHAI PATEL,
DILIP PATEL, SUMANI CORP., INC.,
Petitioners

v.

RAJNI J. PATEL,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Rajni J. Patel respectfully asks this Court to deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 846 F.2d 700 (11th Cir. 1988), and is reprinted at Pet. 1b-13b. The opinion of the United States District Court for the Northern District of Alabama is reported at 660 F. Supp. 1528 (N.D. Ala. 1987), and is reprinted at Pet. 1a-17a.

ADDITIONAL STATUTES INVOLVED

1. Section 274A(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(A), provides:

> It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States—
>
> (A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment . . . .

2. Section 101(a)(3)(A) of IRCA provides:

> Section 274A(a)(1) of the Immigration and Nationality Act shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act.

3. Section 111(d) of IRCA, Pub. L. 99-603, provides:

> (d) SUPPLEMENTAL AUTHORIZATION OF APPROPRIATIONS FOR WAGE AND HOUR ENFORCEMENT—There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division and the office of Federal Contract Compliance Programs within the Employment Standards Administration of the Department in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

REASONS FOR DENYING THE WRIT

Although petitioners devote more than two dozen pages to a general discussion of immigration and labor policies, this case raises only a single narrow issue of statutory construction—whether Congress intended undocumented alien workers to be eligible for back pay and liquidated damages awards under the Fair Labor Standards Act.

Pet. at 24. There are at least five reasons why this Court should not grant *certiorari* to consider that issue in the context of this case.

1. First, there is no conflict between the circuits. Every court to have considered the FLSA rights of undocumented aliens has concluded that Congress intended to provide statutory coverage and the full range of remedial protections to undocumented alien workers who have been the victims of wage or hour discrimination. *See, e.g., Local 512, Warehouse and Office Workers v. NLRB*, 795 F.2d 705, 718 n.12 (9th Cir. 1986); *Brennan v. El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032, at 46,362 (W.D. Tex. 1973); *Alvarez v. Sanchez*, 105 A.D.2d 1114, 482 N.Y.S.2d 184, 195 (1984). The Eleventh Circuit's decision is fully consistent with these cases.

2. Second, even accepting petitioners' broad characterization of the issue as whether, in light of IRCA, "illegal immigrant workers have the same employment-related rights as citizen and legal resident alien workers" (Pet. at 10), there is still no circuit conflict. Petitioners cite numerous lower court decisions, both pre-IRCA and post-IRCA, addressing the statutory coverage and remedial rights of undocumented aliens in other federal statutory contexts. But these cases all hold that undocumented aliens *are* entitled to statutory protection. See Pet. at 13-14, 18-20 (citing cases under the National Labor Relations Act, the Service Contract Act, the Longshore & Harbor Workers' Compensation Act and the Migrant and Seasonal Agricultural Worker Protection Act); see also *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, 860 F.2d 1168, 1171-73 (2d Cir. 1988) (holding, in a pre-IRCA case, that undocumented aliens are entitled to backpay under Title VII). Thus, even viewing the issue in its broadest possible context, the only conflict identified by petitioners is with "the District Court's decision and two dissents in lower court

decisions" (Pet. at 20)—hardly the stuff of which *certiorari* is made.

3. Third, FLSA coverage of undocumented alien workers is supported by the consistent and longstanding construction of the FLSA by the United States Department of Labor, the agency charged with statutory implementation. Since 1942, the Labor Department has held that the FLSA protects all "individuals," documented and undocumented alike. See Pet. at 7b. Moreover, the Labor Department has adhered to that position even after enactment of IRCA. *Ibid.* So important to the Department is its construction of the FLSA that it filed a separate *amicus curiae* brief in support of respondent Patel in this case; and it requested and obtained permission for the U.S. Solicitor of Labor personally to participate at oral argument in support of respondent's position. This longstanding administrative construction was appropriately given substantial deference by the Eleventh Circuit. *Ibid, citing Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985).[1]

4. The Eleventh Circuit provided numerous reasons to support its conclusion that Congress intended, even after IRCA, to provide backpay and liquidated damages remedies to undocumented alien victims of FLSA wage and overtime discrimination. Nothing in the petition casts doubt upon the court's analysis.

First, the Eleventh Circuit focused on the plain language of § 3(3) of the FLSA, which defines "employee."

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[1] Just as the Labor Department supported respondent Patel's position in this case, based on its expertise and experience in administering the FLSA, so too did the EEOC file a supporting *amicus* brief in the Eleventh Circuit, drawing from its experience in administering Title VII, to reiterate that agency's long-held view that undocumented alien workers were entitled to statutory protection under that federal statute. The EEOC's parallel construction of Title VII further supports the Eleventh Circuit's decision in the present case.

Noting that "it would be difficult to draft a more expansive definition," the Eleventh Circuit emphasized that the Act broadly defines "employee" to include "any individual employed by an employer," and that although the Act contains a series of specific exemptions, "none of these exemptions concern immigration status." Pet. at 4b.

Next, the court addressed the FLSA legislative history and the numerous judicial decisions construing that legislative history. Pet. at 5b-6b. That evidence of Congressional purpose further supported the court's conclusion "[t]hat Congress intended a broad definition of the term 'employee,'" and that the courts have "consistently . . . refused to exempt from coverage employees not within a specific exemption." *Ibid.*

Having concluded that "[n]othing in the FLSA or its legislative history suggest that Congress intended to exclude undocumented workers from the act's protections" (Pet. at 7b), the Eleventh Circuit then turned its attention to IRCA itself, and to petitioners' contention that IRCA had implicitly repealed the FLSA's coverage provisions. The court rejected this argument, recognizing that "amendments by implication are disfavored," and that "[o]nly when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one." Pet. at 8b, *citing Rodriquez v. United States*, —— U.S. ——, 107 S.Ct. 1391, 1392 (1987); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). In this case, the court found that "*nothing* in IRCA or its legislative history suggest that Congress intended to limit the rights of undocumented aliens under the FLSA," and that "the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." Pet. at 8b (emphasis added).

Two expressions of legislative intent particularly supported the Eleventh Circuit's conclusion. First, the court

relied upon the House Education and Labor Committee Report to IRCA, which expressed Congress's intent *not* to undermine existing labor law protections for undocumented aliens, by stating:

> [T]he committee does not intend that any provision of the Act would limit the powers of State or Federal labor standards agencies such as the . . . *Wage and Hour Division of the Department of Labor* . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by the employment.

Pet. at 9b, *quoting*, H.R. Rep. No. 99-682(II), 99th Cong., 2d Sess. at 8-9 (1986) (emphasis in opinion).[2] Second, the court quoted the statutory language of IRCA itself, specifically § 111(d), which *increased* FLSA enforcement on behalf of undocumented aliens, by stating:

> There are authorized to be appropriated, in addition to such sums as may be available for such purposes, such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division . . . in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens.

Pet. at 9b, *quoting* Pub. L. No. 99-603, § 111(d), 100 Stat. 3357, 3381 (1986). As the Eleventh Circuit con-

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[2] *See also* H. Rep. No. 99-682(I), 99th Cong., 2d Sess. at 58 (1986) ("It is not the intention of the [House Judiciary] Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of . . . labor standards agencies . . . to remedy unfair labor practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law").

cluded, "[t]his provision would make little sense if Congress had intended the IRCA to repeal the FLSA's coverage of undocumented aliens." *Ibid.*

The Eleventh Circuit also analyzed in detail why federal immigration policies would be served, rather than undermined, by its ruling. As the court stated:

> [T]he FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers' economic incentive to hire undocumented aliens. To achieve this objective the IRCA imposes an escalating series of sanctions on employers who hire such workers. *See* 8 U.S.C. § 1324a. The FLSA's coverage of undocumented workers has a similar effect in that it offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an *incentive* to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.
>
> We recognize the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to recover in an action under the FLSA. We doubt, however, that many illegal aliens come to this country to gain the protection of our labor laws. Rather it is the hope of getting a job—at any wage —that prompts most illegal aliens to cross our borders. By reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA. We therefore conclude that undocumented aliens continue to be "employees" covered by the FLSA.

Pet. at 9b-10b (emphasis in opinion). In other words, the court found that the congressional immigration policies would be furthered by granting continued FLSA

protection to undocumented aliens, because if employers could engage in wage discrimination against those workers without fear of reprisal, employers would have an incentive to violate the law by hiring such workers, notwithstanding the employer sanctions provisions.

Petitioners have not offered a single persuasive reason why this Court should question the Eleventh Circuit's decision. Indeed, petitioners' only legal argument in support of *certiorari* review is that under *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the lower courts are required to consider the impact of federal immigration law interests on any statutory remedy under the federal labor laws. See Pet. at 16-17. But the Eleventh Circuit plainly *did* consider this impact, and the court properly resolved that impact in favor of continued FLSA coverage, basing its analysis on express statements of legislative intent. See Pet. at 9b-10b.[3]

5. Finally, even if the Court were inclined to consider whether IRCA implicitly repealed the FLSA's statutory coverage, this is not the proper case for such consideration. This is *not* a case, as characterized by petitioners, which "represents a clear presentation of the issues, unclouded by significant extraneous questions." Pet. at 23. Rather, because Patel's last date of employment occurred well before the November 6, 1986 effective date of IRCA,

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[3] In *Sure-Tan*, this Court held that undocumented aliens were "employees" under the NLRA; but it denied a backpay remedy to the aliens in that case, who had accepted voluntary departure (after an INS raid) and were home in Mexico throughout their backpay periods. 467 U.S. at 898-905. Both the Ninth Circuit and the Second Circuit have construed *Sure-Tan* as *not* foreclosing an award of backpay to aliens who remained in this country, and were therefore "available in fact" for work, during their backpay periods. *Local 512, Warehouse and Office Worker's Union v. NLRB*, *supra*, 795 F.2d at 715-20; *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, *supra*, 860 F.2d at 1172-73. The Eleventh Circuit found it unnecessary to reach the issue, because in an action for unpaid minimum wages and overtime under the FLSA, the affected alien *did* work. Pet. at 12b.

it is likely that this Court would not reach the issue of post-IRCA remedies under the FLSA, even if *certiorari* were granted.

Respondent Patel was employed by petitioners from July 1983 through October 1985. As petitioners themselves realize, any violation of the FLSA therefore occurred prior to the November 6, 1986 enactment of IRCA. Pet. at 23. Petitioners contend that this is irrelevant, arguing that "the key time period for determining whether illegal immigration is encouraged is when the remedy is provided," rather than when the violation occurred. *Ibid.* But whether an implied repeal should apply to conduct predating the effective date of IRCA is a question of congressional intent and equitable balancing. *See generally Bennett v. New Jersey*, 470 U.S. 632, 638-41 (1985); *DeGurules v. INS*, 833 F.2d 861, 863 (9th Cir. 1987). And the only court to consider this issue in the context of IRCA has held that IRCA is *not* retroactive, and that its enactment does *not* affect the backpay rights of undocumented aliens who suffered injuries before IRCA's enactment. *Rios v. Enterprise Assoc. Steamfitters Local Union No. 638*, *supra*, 860 F.2d at 1172 n.2, *citing* 8 U.S.C. § 1324a(i). Accordingly, there is a substantial likelihood that this Court would not reach the principal issue asserted by petitioners, even if *certiorari* were granted.

The dates of Patel's employment also have great significance under the employer sanctions provisions of IRCA. Even if Patel had continued working for petitioners after November 6, 1986 (the effective date of IRCA), he would have been considered a "grandfathered" employee within the meaning of that statute. As such, his continued employment could not have subjected petitioners to statutory sanctions.[4] Since petitioners' argu-

[4] *See* IRCA § 101(a)(3)(A) (IRCA's employer sanctions provision "shall not apply to the hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act").

ments rest largely on the perceived conflict between the remedial rights provided by the federal labor laws and the employer sanctions provisions of IRCA, the fact that sanctions would in any event be unavailable in this case means that the perceived conflict—at least in the context of a grandfathered employee like Rajni Patel—is wholly illusory. Whether or not one agrees with petitioners' assertion that "[t]he single most important change made by the 1986 law was to criminalize the hiring of illegal aliens" (Pet. at 20), one cannot contest that such criminalization does *not* apply to the hiring (or continued employment) of workers who, like respondent Patel, were hired before the effective date of the 1986 IRCA amendments. The fact that this case could be decided on either of these two grounds, rather than upon the issue raised, is yet another ground for denying *certiorari* review. See *Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959); *McCarthy v. Bruner*, 323 U.S. 673 (1944); *Williams v. Zuckert*, 371 U.S. 531, 532-33 (1963); *Belcher v. Stengel*, 429 U.S. 118, 118-20 (1976).

CONCLUSION

For the reasons stated, respondent Rajni Patel hereby requests that the Petition For Writ of Certiorari be DENIED.

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QUALITY INN SOUTH, ET AL., PETITIONERS

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RAJNI J. PATEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly held that undocumented aliens are "employees" for purposes of Section 3(e)(1) of the Fair Labor Standards Act of 1938, 29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986), and thus may recover minimum wages and overtime pay owed under the Act.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises the question whether undocumented aliens are protected by the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* Section 3(e)(1) of the FLSA defines the term "employee" to mean "any individual employed by an employer." 29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986). The Secretary of Labor, the official charged with enforcing the FLSA, consistently has interpreted this provision to include undocumented alien workers. Indeed, the Secretary has aimed a major part of her FLSA enforcement efforts at industries and localities where undocumented aliens traditionally have been found to be employed. In this private FLSA enforcement action brought by an undocumented alien, the district court invited the Secretary to present her views on the question of FLSA coverage, but rejected the Secretary's construction of the statute. The Secretary participated as an amicus curiae in the court of appeals, which reversed the decision of the district court and accepted the Secretary's inter-

pretation. Accordingly, the Department of Labor has a substantial interest in this case.

STATEMENT

1. Congress enacted the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). Congress also found that the existence of substandard working conditions "constitutes an unfair method of competition in commerce" and "interferes with the orderly and fair marketing of goods in commerce." 29 U.S.C. 202(a)(3) & (5). To combat these and other consequences of substandard employment, the FLSA requires covered employers, among other things, to pay their employees a statutorily prescribed minimum wage for each hour worked (29 U.S.C. 206), and to pay their employees who are required to work more than 40 hours per week at one and one-half times their regular rate of pay for each overtime hour (29 U.S.C. 207(a)(1)). The FLSA broadly defines the term "employee" to include "any individual employed by an employer" (29 U.S.C. 203(e)(1) (1982 & Supp. IV 1986)). Section 16(b) permits injured employees to bring an action against an employer for unpaid minimum wages and overtime compensation, and for an additional equal amount as liquidated damages (29 U.S.C. 216(b)). The Secretary of Labor is also authorized to sue for unpaid wages and liquidated damages on behalf of injured employees (29 U.S.C. 216(c)), and may seek to enjoin violations of the minimum wage and overtime pay provisions (29 U.S.C. 217).

The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, imposes numerical limitations and

prescribes qualifications for the legal admission of aliens, and sets forth requirements and procedures for their entry and stay in the United States. Congress sought in the INA to preserve jobs for American workers and to protect American workers' wage rates and working conditions. See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 893 (1984). To this end, the INA provides that immigrant aliens may not be permanently admitted into this country for purposes of employment unless their employment "will not adversely affect the wages and working conditions of the workers in the United States similarly employed." 8 U.S.C. 1182(a)(14). The INA also defines the relevant category of nonimmigrant aliens as persons coming temporarily to the United States to work "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1101(a)(15)(H)(ii) (1982 & Supp. IV 1986).

In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, which comprehensively amended the INA to include new measures for controlling illegal immigration to the United States. Significantly, IRCA added provisions which for the first time impose penalties on employers who, after November 6, 1986, knowingly hire aliens who are not authorized to work in this country. See 8 U.S.C. 1324a(a), (e)(4) & (f)(1) (Supp. IV 1986). IRCA does not, however, make it a separate offense for an undocumented alien to accept employment in this country.

2. The relevant facts are undisputed. Respondent Rajni J. Patel is a citizen of India who entered the United States on June 1, 1982, pursuant to a visitor's visa (Pet. App. B2). Although his visa expired after six weeks, Patel remained in this country (*ibid.*). From July until October 1985, he worked for petitioners Sumani Corporation and

its two majority stockholders at a hotel, the Quality Inn South, that they operated in Birmingham, Alabama (*ibid.*).

In August 1986, Patel brought this action against petitioners under Section 16(b) of the FLSA, seeking to recover unpaid minimum wages and overtime compensation, an additional equal amount as liquidated damages, and attorney's fees (Pet. App. A1-A2). Ruling on petitioners' motion for summary judgment, the district court held that, as an undocumented or illegal alien,[1] respondent could not bring an action under or recover for alleged violations of the FLSA. Specifically, the court concluded that an illegal alien is not an "individual" for purposes of the Act's definition of "employee," which includes "any individual employed by an employer" (*id.* at A8). The court also concluded that providing FLSA protection to illegal aliens irreconcilably conflicts with IRCA because it "encourages the alien illegally to obtain entry into the United States and to work here," whereas "Congress has now implemented a policy of discouraging the entry and employment in this country of illegal aliens" (*id.* at A8, A14). The court acknowledged (*id.* at A8-A10) that in *Sure-Tan,* this Court held that the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, prohibits unfair labor practices committed against undocumented workers, but concluded that Congress intended in IRCA "to correct

[1] The terms "illegal" and "undocumented" aliens are used interchangeably in this brief to refer to noncitizens who may be subject to deportation. They include individuals who have entered the United States without authorization as well as those, like Patel, who have violated a condition of entry, for example, by exceeding the temporary period of authorized stay or by taking employment when not authorized to do so.

a policy in the past of allowing illegal aliens the full protection of all laws designed to protect workers legally within this country" (Pet. App. A13).

3. The Eleventh Circuit reversed, holding that "undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages" (Pet. App. B13). The court found that the "overwhelming weight of authority" supports the conclusion that the FLSA protects undocumented aliens (*id.* at B7). It emphasized that the language, structure, and history of the statute unequivocally show that "Congress intended an all encompassing definition of the term 'employee' that would include all workers not specifically excepted" (*id.* at B4). The court added that this Court's decision in *Sure-Tan*, holding undocumented aliens to be "employees" within the meaning of the NLRA, "weighs heavily in favor" of reaching the same conclusion under the FLSA, because the two acts have similar objectives and employ similar definitions of the term "employee" (*id.* at B6). Moreover, the court stated, the Department of Labor, whose interpretation of the statute "is entitled to considerable deference," has long interpreted the FLSA to cover undocumented aliens (*id.* at B6-B7).

The court of appeals rejected the district court's conclusion that Congress intended IRCA to limit the rights of undocumented aliens under the FLSA, finding instead that "IRCA's legislative history strongly suggests that Congress believed that undocumented aliens would continue to be protected by the FLSA," and that "the FLSA's coverage of undocumented aliens goes hand in hand with the policies behind the IRCA" (Pet. App. B8-B9). The court recognized "the seeming anomaly of discouraging illegal immigration by allowing undocumented aliens to

recover in an action under the FLSA" without regard to his immigration status, but explained that "[b]y reducing the incentive to hire such workers the FLSA's coverage of undocumented aliens helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA" (*id.* at B10).

Finally, the court of appeals rejected the argument that *Sure-Tan* prevents undocumented workers from recovering back pay under the FLSA for periods when they were not legally present in the United States. In that case the Court concluded that illegal aliens who had left the country should be deemed "unavailable" for work, and therefore ineligible for a back pay award under the NLRA, while they were out of the country. 467 U.S. at 897, 903. Here, the court of appeals stated, the question is whether an employee can recover unpaid minimum wages and overtime "for work *already performed*" (Pet. App. B12). Since "[i]t would make little sense to consider Patel 'unavailable' for work during a period of time when he was actually working" (*ibid.*), the court concluded that "Patel is entitled to the full range of available remedies under the FLSA," and remanded the case for a determination on the merits of his claim (*id.* at B13).

ARGUMENT

The court of appeals correctly determined that Congress intended the FLSA to cover undocumented aliens, and that nothing in IRCA, its policies, or purposes precludes undocumented aliens from recovering an award of back pay or liquidated damages under the FLSA. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Moreover, the entire period of employment at issue in this case predates the passage of IRCA, and the court of appeals' opinion is confined to the definition of "employee" in the FLSA. Accordingly, further review is unwarranted.

1. The court of appeals correctly held that undocumented alien workers are "employees" within the meaning of the FLSA and thus may recover under Section 16(b) of the Act for minimum wage and overtime pay violations. As this Court has explained, Congress expansively defined the term "employee" in the FLSA to encompass "any individual employed by an employer" (29 U.S.C. 203(e)(1) (1982 & Supp. IV. 1986)), and specifically identified any exemptions to FLSA coverage (29 U.S.C. 213); thus it clearly intended to include all employees within the scope of the statute unless specifically excluded. See *United States* v. *Rosenwasser,* 323 U.S. 360, 362-363 (1945). There is no exception to FLSA coverage for undocumented aliens. The statutory language therefore unequivocally embraces all individuals employed by a covered employer irrespective of their immigration status or legal authority to accept work. Cf. *Citicorp Industrial Credit, Inc.* v. *Brock,* No. 86-88 (June 22, 1987) (that Congress identified only two narrow categories of persons who are not subject to the "hot goods" provision of the FLSA suggests that all other persons are covered).

Interpreting similar definitional provisions in the NLRA, this Court concluded that "[s]ince undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.' " *Sure-Tan*, 467 U.S. at 891-892. This Court's interpretation of NLRA coverage is particularly persuasive here because the NLRA and the FLSA address related concerns and share similar objectives. Application of FLSA protections to undocumented alien workers not only promotes the health and well-being of those workers, but also assures that " '[a]cceptance by illegal aliens of jobs on substandard terms as to wages and working conditions [will] seriously depress wage scales

and working conditions of citizens and legally admitted aliens.' " *Sure-Tan*, 467 U.S. at 892 (citation omitted). In addition, by eliminating the unfair competitive advantage accruing to employers that maintain substandard working conditions, FLSA coverage of undocumented aliens also furthers Congress's goal " 'that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *.' " *Citicorp Industrial Credit, Inc.* v. *Brock*, slip op. 9 (citation omitted).

Moreover, for more than 40 years the Secretary of Labor, whose construction of the FLSA is entitled to considerable deference (*Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 297 (1985)), consistently has interpreted the Act to cover undocumented alien workers, and has enforced the statute and obtained relief on their behalf. See, *e.g.*, *Donovan* v. *MFC, Inc.*, 100 Lab. Cas. (CCH) ¶ 34,519 (N.D. Tex. Dec. 27, 1983); *Donovan* v. *Burgett Greenhouses, Inc.*, 100 Lab. Cas. (CCH) ¶ 34,504 (D.N.M. Nov. 23, 1983); *Brennan* v. *El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. Dec. 26, 1973).[2] Such deference is particularly war-

[2] As early as 1942, the Wage and Hour Administrator opined that alien prisoners of war "are in the same category as any other person" for purposes of the FLSA and must be paid the minimum wage. See Administrator's letter of Jan. 9, 1942, to Col. Percy B. McClung, Alien Enemy Internment Camp. And, at least since 1981, the Secretary has focused a major part of her FLSA enforcement effort—the Special Targeted Enforcement Program (STEP)—at industries and localities where undocumented aliens traditionally have been found to be employed. In 1980, the Comptroller General reviewed the Department's use of appropriated funds to enforce the FLSA on behalf of undocumented aliens and concluded that this program activity, a precursor of the STEP program, was lawful even though at the time (from 1978-1980) Congress had included a spending restriction in the Department's overall appropriation which expressly prohibited the use of appropriated funds "to carry out any

ranted here because Congress recently narrowed the definition of "employee" to exclude certain state and local government employees (see 99 Stat. 790 (1985)), but did not modify the Secretary's interpretation of the statute to exclude illegal aliens. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 845-846 (1986). And the only other court of appeals that has directly addressed the issue concluded, as did the court below, that the Act's protections apply to undocumented aliens. See *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987), cert. denied, No. 87-1609 (June 30, 1988); see also *Lopez* v. *Rodriguez*, 668 F.2d 1376, 1378 n.4 (D.C. Cir. 1981) (finding no merit in contention that enforcing the FLSA on behalf of illegal aliens would undermine enforcement of immigration laws).[3]

2. Petitioners do not appear to question that Congress intended the FLSA as originally enacted to protect un-

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activities for or on behalf of any [undocumented] * * * alien * * *." Department of Labor Appropriation Act, 1979, Pub. L. No. 95-480, § 102, 92 Stat. 1571. Because the program "does nothing to enhance the alien worker's position or rights vis a vis legal American workers or in any way confer on such aliens additional benefits to which they would not otherwise be entitled," the Comptroller General concluded that "this program cannot be said to be 'on behalf of' illegal aliens." Comptroller Gen. Op. No. B-198205 (May 20, 1980).

[3] As petitioner acknowledges (Pet. 12-13), the courts have also held in numerous other contexts that undocumented aliens enjoy labor law protections. See *Local 512, Warehouse & Office Workers' Union* v. *NLRB*, 795 F.2d 705, 718 n.12 (9th Cir. 1986) (collecting cases). Most recently, in *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1173 (1988), the Second Circuit held, by analogy to *Sure-Tan*, that the protections of Title VII of the Civil Rights Act of 1964 "must apply to undocumented workers, at least to the extent that those protections do not conflict with immigration laws."

documented alien workers. Rather, they challenge the court of appeals' conclusion (Pet. App. B8-B10) that following the passage of IRCA, undocumented aliens continue to enjoy FLSA protections. Focusing on Congress's determination in IRCA to impose penalties on employers who knowingly hire or continue to employ undocumented aliens, petitioners argue that after the enactment of IRCA the question of FLSA coverage turns on whether the alien was " 'authorized' to accept employment in the United States" (Pet. 20-21), and conclude that "IRCA's comprehensive scheme precludes enforcement of many employment-related protections by illegal alien workers" (Pet. 25). As the court of appeals pointed out, however, IRCA does not expressly amend the FLSA to limit that Act's protections to "authorized" alien employees, and "nothing in the IRCA or its legislative history suggests that Congress intended to limit the rights of undocumented aliens under the FLSA. To the contrary, the FLSA's coverage of undocumented aliens is fully consistent with the IRCA and the policies behind it." Pet. App. B8. Thus, consideration of the "immigration law interests affected" (Pet. 20), as reflected in IRCA, yields no different result than does analysis of the issue under the terms of the FLSA.

As the court of appeals noted (Pet. App. B8-B9), IRCA's legislative history demonstrates that Congress intended to continue FLSA protection of undocumented workers. Reporting on the bill that formed the basis for IRCA, the House Judiciary Committee expressly stated its intent not to affect this Court's holding in *Sure-Tan* that the NLRA definition of "employee" includes illegal aliens, and not to "undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or

labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by existing law." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 1, at 58 (1986). The House Education and Labor Committee stated even more specifically that "the committee does not intend that any provision of this Act would limit the powers of * * * the Wage and Hour Division of the Department of Labor * * * in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies," because "[t]o do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment." H.R. Rep. No. 682, 99th Cong., 2d Sess. Pt. 2, at 8-9 (1986). Indeed, IRCA expressly authorized the appropriation of additional sums "for enforcement activities of the Wage and Hour Division * * * in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." 8 U.S.C. 1101 note (Supp. IV 1986). By providing increased funding to remove economic incentives to employers, Congress obviously intended the Secretary to enforce the FLSA's wage and hour requirements with respect to illegal aliens.

Petitioners erroneously argue that allowing illegal immigrants to invoke traditional labor law protections—as in this suit for unpaid wages and damages under the FLSA—"will perpetuate and encourage illegal immigration in direct contravention of the purposes of IRCA" (Pet. 21). As the court below acknowledged, there is a "seeming anomaly [in] discouraging illegal immigration by

allowing undocumented aliens to recover in an action under the FLSA" (Pet. App. B10). But the court correctly understood that undocumented workers do not enter this country to gain the protection of the United States' minimum wage or other labor laws. "Rather it is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders" (*ibid.*). And the court recognized that because application of the FLSA to undocumented workers reduces an employer's incentive to hire such workers, it "helps discourage illegal immigration and is thus fully consistent with the objectives of the IRCA" (*ibid.*). As explained in *Sure-Tan,* "[i]f an employer realizes that there will be no advantage * * * in preferring illegal aliens * * * any incentive to hire such illegal aliens is correspondingly lessened," and "[i]n turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." 467 U.S. at 893-894.[4] In sum, enforcement of the FLSA with respect to undocumented aliens is consistent with the policies of IRCA because it provides an additional disincentive for employers to hire illegal aliens.

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[4] The court of appeals' conclusion that job availability, and not wage guarantees, is the most important factor in illegal immigration finds support in the report of the Select Commission on Immigration and Refugee Policy. The Select Commission noted that "studies indicate that undocumented/illegal aliens are attracted to the country by U.S. employment opportunities," and "[h]owever low the salaries of undocumented/illegal aliens in the United States, * * * their U.S. wages are many times that of previous wages in the home country." House and Senate Comm. on the Judiciary, 97th Cong., 1st Sess., *U.S. Immigration Policy and the National Interest* 36-37 (Joint Comm. Print No. 8 (1981)). The Select Commission's findings and recommendations laid the foundation for IRCA. See S. Rep. No. 132, 99th Cong., 1st Sess. 21-26 (1985) (chronicling the history of immigration reform).

In any event, the IRCA provision making it unlawful for an employer to hire an undocumented alien (8 U.S.C. 1324a(a) (Supp. IV 1986)) does not apply retroactively (see 8 U.S.C. 1324a(i) (Supp. IV 1986)), and, as petitioners acknowledge (Pet. 23), all of the FLSA violations alleged in this case occurred before the enactment of IRCA. Accordingly, the question whether undocumented aliens are covered by the FLSA following the passage of IRCA is not squarely presented on the facts of this case.

3. Nor is there any merit to the petitioners' argument (Pet. 19-20) that *Sure-Tan* precludes courts from providing remedies to undocumented aliens for violations of the FLSA. As the court of appeals recognized, the remedial constraints identified by this Court in *Sure-Tan* have no application here. *Sure-Tan* involved a court-ordered six-month backpay award to illegal alien employees who had been discriminatorily discharged in violation of the NLRA and had voluntarily departed the country to avoid deportation. Because the employees in *Sure-Tan* had immediately left the country and were not available for reinstatement or work during the specified backpay period, the Court found that the award of back pay "constitute[d] pure speculation" and presented a potential conflict with the INA. 467 U.S. at 901, 903. The Court therefore conditioned the offers of reinstatement on the employees' legal reentry into the United States and tolled the accrual of back pay "during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903. By contrast, in this case neither reentry nor reinstatement is at issue and the unpaid wages claimed by respondent have fully accrued and are certain. In short, *Sure-Tan* does not require that undocumented alien workers must be denied FLSA remedies for hours they actually worked.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-830

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1988

QUALITY INN SOUTH, Manibhai Patel, Dilip Patel, Sumani Corp., Inc.,
Petitioners

v.

RAJNI J. PATEL,
Respondent

REPLY BRIEF FOR PETITIONERS

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v.

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Respondent

REPLY BRIEF FOR PETITIONERS

PETITIONERS' REPLY MEMORANDUM

Respondent does not understand the scope of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (Supp. IV 1986) [hereinafter IRCA]. Surprisingly, neither does amicus curiae United States Department of Labor. Both fail to understand this Court's prior cases involving the rights of illegal aliens to government largesse, or how those cases affect the decision below.

These failures to understand are reflected in the failure of either opposing brief to deal substantively with the effect of the IRCA on prior cases and legal theories. As a result, neither opposing brief adequately deals with the question of remedies available in a private action brought under the Fair Labor Standards Act by an illegal alien. Neither opposing brief adequately deals with the question of how a court should apply labor-law-related remedies to interfere least with the immigration laws. *Sure-Tan v. National Labor Relations Board*, 467 U.S. 883 (1984).

Thus, neither opposing brief provides valid reasons why this Court should not grant the petition for a writ.

I. THE IRCA IS A COMPREHENSIVE ATTEMPT TO REMOVE ALL ILLEGAL ALIENS FROM THE UNITED STATES.

Both respondent and amicus erroneously imply that the IRCA is so limited in its sweep as to allow some avenue for illegal aliens to remain in the United States. Amicus, for example, while noting that the IRCA "comprehensively amended the INA to include new measures for controlling illegal immigration to the

United States," contends that the IRCA did not criminalize the acceptance of employment by illegal aliens in this country. Brief of U.S. Department of Labor as Amicus Curiae at 3 [hereinafter Amicus].

Taking such a narrow view of the IRCA distorts the tremendous effect of the 1986 law. There is no longer any legitimate means by which an illegal alien can remain in this country. A review of even a few of the provisions of IRCA illustrates how miserly are respondent's and amicus' concepts of the effect of the IRCA.

A. Employer Sanctions

As all parties recognize, the IRCA made it illegal to hire an illegal alien. 8 U.S.C. § 1324a.

B. Harboring and Shielding Illegal Aliens

Neither respondent nor amicus recognized the changes to 8 U.S.C. § 1324 (as distinguished from 8 U.S.C. § 1324a, which IRCA created). That section, which criminalizes "conduct tending substantially to facilitate an alien's remaining illegally in this country," *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975), was substantially strengthened by IRCA. The amendment weakened the so-called Texas Proviso, which had for so long stymied this Court's analysis of immigration law enforcement. *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 240 (1984). The authors of the amendment were well aware of the cases interpreting this section and intended to expand and clarify coverage of employers of illegal aliens. *Immigration Reform and Control Act of 1985*, S. Rep. No. 132, 99th Cong., 1st Sess. 29-30 (1985).

C. Fraudulently Obtaining Employment

In addition, the IRCA also criminalized an alien's false attestation or use of documents to obtain employment. The IRCA amended 18 U.S.C. § 1546 to criminalize attempts to circumvent the prohibition on hiring.

D. Denial of Welfare Benefits

Further, the IRCA substantially restricted an illegal alien's ability to obtain social services benefits.[1] IRCA established a comprehensive method to remove illegal aliens from state welfare rolls. IRCA, sec. 121.

E. Denial of Adjustment of Status

IRCA prohibited many illegal aliens from legalizing their status. Although IRCA generously gave millions of illegal aliens amnesty, 8 U.S.C. § 1255a, at the same time, it restricted eligibility for amnesty to those illegal aliens with many years' residence in this country. In addition, aliens who entered illegally or violated the terms of their entry were not allowed to adjust to permanent residence after the passage of IRCA. 8 U.S.C. § 1255(c)(2).

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1 This court has long held that illegal aliens do not have constitutional rights to social services: "Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty which a conscientious sovereign makes available to its own citizens and some of its guests." *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

F. Unlawful Entry

IRCA continues the criminalizing of entry into the United States without inspection and admission by immigration officers. 8 U.S.C. § 1325.

G. Congressional Findings and Declarations

Finally, Congress twice declared its resolve that illegal immigration be stopped. First, Congress found that it is an essential element of the program of immigration control that the "INS and . . . other appropriate Federal agencies . . . prevent and deter the illegal entry of aliens into the United States and the violation of the terms of their entry." IRCA, sec. 111. Then Congress declared its resolve that "the immigration laws of the United States should be enforced vigorously and uniformly." IRCA, sec. 115.

Is it consistent with IRCA that one government agency should strive "vigorously and uniformly" to "prevent and deter" illegal immigration while at the same time another branch of government is providing illegal aliens with the financial means to remain in this country? The Eleventh Circuit felt its decision below allowing an illegal alien to maintain an action for thousands of dollars in back pay and liquidated damages reflected a "seeming anomaly", Petitioner's Brief at Appendix B10; a better view might be that the Eleventh Circuit misunderstood the sweep of the changes made by the IRCA.

Respondent and amicus similarly miss the comprehensive nature of these changes and declarations. They thereby miss the essential point of IRCA: illegal aliens are not to be allowed to remain in this country. Any activity by a government agency to enforce a labor-related law should not encourage or allow an illegal alien to remain in this country. To do otherwise would

undercut the complex and comprehensive structure created by the IRCA.

II. RESPONDENT'S AND AMICUS' VIEW OF THE ROLE OF THE DEPARTMENT OF LABOR IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE IRCA.

Respondent's and amicus' views on the role of the Wage and Hour Division of the Department of Labor are inconsistent with the plain language of the IRCA. Both respondent and amicus contend that Congress intended the Wage and Hour Division to increase its enforcement of the FLSA. Respondent's Brief in Opposition at 6 [hereinafter Opp.]; Amicus at 11. Seemingly, under respondent's and amicus' legal reasoning, this increase is to occur at the expense of, or at least completely independent of, the enforcement of the new prohibition on hiring illegal immigrants.

In fact, both respondent and amicus contend that statutory language authorizing more funds to the Wage and Hour Division, IRCA, sec. 111(d), is a signal that Congress intended more FLSA enforcement. For example, amicus U.S. Department of Labor, which ought to know what in a statute affects it, contends: "By providing increased funding . . . Congress obviously intended the Secretary to enforce the FLSA's wage and hour requirements with respect to illegal aliens." Amicus at 11.

No such direction appears in the provision of IRCA that authorizes additional funding. There is only the statement that the additional funds are provided "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." IRCA, sec. 111(d). The only relevant explicit reference to the Department of

Labor in the IRCA, however, is that employers retain employment verification records for inspection by Department of Labor officials. 8 U.S.C. § 1324a(b)(3). There is no mention of wage and hour records in the IRCA. Thus, contrary to the position of respondent and amicus, the job of the Department of Labor is to help enforce the prohibition on hiring illegal aliens.[2]

The Senate Committee Report buttresses this interpretation when it declares that the additional funds are "for enforcement activities in connection with the bill." S. Rep. No. 132 at 13. The House Committee reports and proposed bills, cited in other contexts by respondent and amicus, contain no specific authorization language for the Wage and Hour Division. *See* H.R. 3810, 99th Cong., 1st Sess., sec. 111 (1985); H.R. Rep. No. 682 (Part I), 99th Cong., 2d Sess. 7, 11 (1986).

III. THIS CASE IS APPROPRIATE FOR REVIEW.

Both respondent and amicus misunderstand the need for review by this Court. In support of the proposition that the circuits are not in conflict, both opposing briefs cite many cases (most handed down prior to the 1986 passage of IRCA) in which lower courts have provided labor-law related and other benefits to illegal aliens. Opp. at 8; Amicus at 3. These cases, however, are examples of the need for guidance from

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2 For an example of an IRCA provision directing the Department of Labor to monitor and protect wages and working conditions for American workers, see 8 U.S.C. § 1186(a)(1)(B) and (g) (1986).

this Court on an important topic misunderstood by the lower courts. Sup. Ct. R. 17.1(c).

It is precisely because the lower courts are uniformly ignoring the prior decisions of this Court that this case needs to be reviewed. In several cases, lower court panels have been split on the essential question of the rights of illegal aliens. *Compare Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987) (holding that agency may not deny family benefits, even though parents were illegal aliens and thus ineligible to register for work, as required by the program) *and In re Reyes*, 814 F.2d 168, 180 (5th Cir. 1987), *cert. denied*, *Griffin and Brand of McAllen, Inc. v. Reyes*, 108 S. Ct. 2910 (1988) (noting that despite prohibition of employment in Migrant and Seasonal Agricultural Worker Protection Act, illegal status was irrelevant under both that act and the Fair Labor Standards Act) *with Doe v. Reivitz*, 830 F.2d 1441, 1451 (Wood, J., dissenting) (noting contradiction between court's holding and the congressional scheme to deter illegal immigration) *and Reyes*, 814 F.2d 168, 171 (Jones, J., dissenting) (arguing that previously no court has allowed illegal aliens to recover statutory remedies under the FLSA).

It is notable that respondent barely mentions this Court's decision in *Sure-Tan*. Opp. at 8, n. 3. In *Sure-Tan*, this Court held that illegal aliens were employees covered by the National Labor Relations Act in cases of explicit anti-union bias, 467 U.S. 883; nevertheless, remedies available to United States citizens in such cases would not be available to illegal aliens. *Id.* at 902-3. In addition, by endorsing the Ninth and Second Circuits' expansive interpretations of *Sure-Tan* on back-pay and other mechanisms that allow illegal aliens to remain in the United States, respondent and amicus again ignore the clear implications of the comprehen-

sive IRCA program to eliminate illegal immigration and remove illegal immigrants from the United States.

CONCLUSION

THEREFORE, Petitioners respectfully request this Court to issue the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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